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AN INTRODUCTION TO THE RULES OF LAW

PART I: CONSIDERATION OF THE RULES OF LAW

THE correct application and legitimate adaptation of the Rules of Law presuppose a sound knowledge of and an adequate facility in the use of these Rules. It would be entirely improper to stress the importance of the Rules of Law in the interpretation of law without at the same time insisting upon a thorough preparation in the construction, division and utility of these Rules. It is essential, therefore, that every student of law who expects to benefit by the knowledge of these Rules be thoroughly grounded in the meaning, application and possible adaptation of the Rules of Law. To omit this foundation can only result in slipshod work. This would tend toward a distaste for one of the most useful aids in the interpretation of law.

It is, of course, to be regretted that most of the more important commentaries on the Rules of Law are not always accessible. This is a distinct handicap and one which is not easily remedied. There is no better way of training students in legal matters than by a thorough, if at times, laborious study of the Rules of Law. While methods of instruction will almost necessarily vary in various schools, there can be little doubt of the consummate utility of the study of the Rules of Law. More will be said on this point later.

The historical source of the separate Rules of Law should, whenever possible, be studied in detail. This is important not only for the immediate application of a particular Rule but also for a possible concept which can be legitimately adapted for use where the Rule itself has no direct application. It is in this latter point where a thorough student of law can distinguish himself. But it is also here where the greatest dangers of misuse will be found. If the student passes this test successfully, he can be relied upon to interpret laws safely and sanely.

This introduction will consist of two parts. The first part will consider the Rules of Law in general and the Rules of Law of Pope Boniface VIII in particular. The second part, to be published later, will consider several items of greater interest in the Rules of Law of Pope Boniface VIII.

The Rules of Law

1) *The concept of a Rule of Law*

What is a Rule of Law? Fortunately a definition is given in Roman Law. This definition is found in the collection of Rules which conclude the Digest of Justinian.[1]

The definition of a Rule of Law is given by the jurist Paul; *Regula est, quae rem quae est breviter enarrat.* This definition is not difficult to understand. The only doubt which can be raised regarding this definition is the exact meaning of the term *rem.* Such doubt, however, if subjected to the scrutiny of jurisprudence, will unquestionably be resolved into the interpretation of *rem* as meaning *ius.* This is clearly indicated by the constant interpretation of this term in the definition of a Rule of Law in the way indicated. Among the more important earlier commentators on the Rules of Law might be mentioned Reiffenstuel[2] while among the later authors Reh can be cited.[3] Reiffenstuel and Reh agree that the term *rem*

[1] D. 50, 17, 1.

[2] *Jus Canonicum* (Parisiis, 1870), vol. VII, p. 1, no. 2.

[3] *The Rules of Law and Canon Law* (Romae, 1939), pp. 16, 17.

does not mean a thing or a fact, or a cause brought into controversy but the law itself.[4] Although it is useful to see that jurisprudence has consistently interpreted the term *rem* to mean *ius,* it is even better to rest this interpretation on the place the citation occupies in the list of Rules in Roman Law. This place is the very first in a series of 211 Rules most of which are abbreviations of law and not descriptions of things or facts.

Whatever question may possibly arise in regard to the actual meaning of the term *rem* will also arise in regard to the term *rerum* in the jurist Paul's further indication of a Rule of Law. This is the text: *per regulam igitur brevis rerum narratio traditur.*[5] Here, too, the term *rerum* is accepted as meaning *iurium.* The same authority of jurisprudence can be adduced for this acceptance. Reh, for instance, says that " a rule of law is a brief narration or relation of the law regarding a certain point ".[6] If, then, jurisprudence be followed there can be no practical doubt that the term *rem* means *ius* and *rerum* means *iurium.* It is important that this item be determined before other points regarding the Rules of Law are investigated. A Rule of Law, then, is a short statement of the law. How this short statement is drawn from several texts of law regulating diverse things will be seen later.

Is a Rule of Law a principle of law? If by principle of law is meant a moral source from which positive legislation arises, it is obvious that a principle and a Rule of Law are not convertible. While the juridical order is part of the moral order,[7] so that all positive legislation should reflect the principles of the moral law many laws are not immediately deducible from it. On the other hand, if by a principle of law is meant a legal proposition which supports legislation, some Rules of Law

[4] Reiffenstuel, *o. c., l. c.,* per *rem* non denotatur res seu factum, vel causa in controversiam deducta, sed ipsum ius. Cf. Reh, *o. c., l. c.*

[5] D. 50, 17, 1.

[6] *O. c.,* p. 17.

[7] Cf. Cathrein, *Philosophia Moralis* (Friburgi Brisgoviae, 1915), pp. 220, 221.

could aptly be called principles. Such, for instance, would be Rules 55[8] and 77[9] which indicate that honors and conveniences entail responsibilities. These and other Rules which are mostly restatements of natural law[10] are in reality principles. The same thing cannot be said of other Rules. For example, Rule 28 which denies extension of favors[11] is merely a determination on the part of the legislator to restrict concessions but this attitude can be altered.

Reh says,[12] materially considered principles and Rules of Law may be identical but that their formal aspect is distinct. Reh shows adequately that a Rule of Law is an effect of a law while a principle of law is not drawn from a law. This doctrine is correct. To consider a Rule of Law as a principle of law is to employ a Rule of Law in its adapted sense. In this way, Reh distinguishes a Rule from a principle.

Once the formal notion of a Rule of Law is clear, it will not be entirely inaccurate to call Rules principles and to substitute Rules when the text of positive legislation expects principles to be applied. The clearest case of such application is in canon 20 where principles of law are to be used to establish a norm of action.[13] There is no doubt among canonists that at least the Rules of Law of Pope Gregory IX and of Pope Boniface VIII can be used in canon 20.[14] There is some doubt whether the Rules of Law in Roman Law can also be used.[15]

[8] R. J. in VI°. Qui sentit onus sentire debet commodum et e contra.

[9] R. J. in VI°. Rationi congruit ut succedat in onere qui substituitur in honore.

[10] E.g., Reg. 2, 4, 5, 12, 51, in VI°. Cf. also D. 50, 17, 42, 169, 180.

[11] R. J. in VI°. Quae a iure communi exorbitant nequaquam ad consequentiam sunt trahenda.

[12] *O. c.*, p. 21, 22.

[13] . . . norma sumenda est . . . a generalibus iuris principiis.

[14] Cf. e.g., Vermeersch-Creusen, *Epitome Iuris Canonici* (Mechliniae—Romae, 1933), tom. I, p. 120; Van Hove, *De Legibus Ecclesiasticis* (Mechliniae—Romae, 1930), p. 327; Beste, *Introductio in Codicem* (Collegeville, 1944), p. 85.

[15] Van Hove, *o. c., l. c.*

But it is certain that at times the Rules of Law and principles of law are convertible.

2) *The division of the Rules of Law*

The Rules of Law are easily divided into authentic and doctrinal Rules. This division is found in both Roman and Canon Law. The authentic Rules of Law are the Rules acknowledged by the legislator to be laws. In Roman Law these authentic Rules are found at the end of the Digest.[16] They number 211. In Canon Law, the authentic Rules are found at the end of the fifth book of the Decretals of Pope Gregory IX [17] and at the end of the fifth book of the Decretals of Pope Boniface VIII.[18] There are 11 Rules in the former series and 88 in the latter.

Doctrinal Rules are Rules constructed by jurists and are not recognized by the legislator as law.[19] These rules are frequently called "brocards",[20] or "brocardic rules". These terms are a corruption of the name Burchard, whose volume of collected canons was called "Brocardus". This is the only important division to consider in a study of the Rules of Law. Other divisions are suggested by Reh [21] and Bartoccetti [22] who can be profitably consulted should further knowledge of the divisions of the Rules of Law be desired. For the purpose of this article, the division outlined is sufficient.

It should be mentioned here that the earlier commentators used the Rules of Roman and Canon Law almost indiscrimi-

[16] D. 50, 17.

[17] X, *de regulis iuris*, V, 41.

[18] R. J. in VI°.

[19] Many commentators on the Decretals have constructed Rules. The more important sets of Rules are found in Reiffenstuel, *o. c.*, lib. I, tit. II, no. 384-447, and in Schmalzgrueber, *Ius Ecclesiasticum Universum* (Romae, 1834), lib. V, tit. 41. Two thousand Rules, authentic and doctrinal, are contained in De Mauri, *Regulae Juris* (Milano, 1928).

[20] Cf. Reh, *o. c.*, p. 30; Beste, *o. c.*, p. 85.

[21] *O. c.*, pp. 30-32.

[22] *Le Regole canoniche di Diritto* (Roma, 1939), pp. 210-216.

nately.[23] In Roman Law, Canon Law would be cited occasionally, but in Canon Law the Roman Law was a prolific source in supplying the deficiencies of canonical legislation. The rules of both systems were mutually helpful. There is even a work published in the seventeenth century in which all the rules are grouped as almost of common source.[24]

3) *The construction of the Rules of Law*

It was stated above that a Rule of Law is a short statement of the law. It is essential to remember this for unless the Rule itself be incorporated in legislation, it has not actually the force of law. This indicates how a Rule of Law is constructed. The jurist Paul said that the law is not taken from the Rule but the Rule from the law.[25] Without, then, the law as a source, a Rule of Law is impossible.

There are two distinct ways in which a Rule of Law can be constructed. The first way is by extracting a common element found in several laws; the second by establishing a presumption based upon past facts. The first way is clearly common to some Rules found in Canon Law and in Roman Law. Reiffenstuel gives an example or two in Canon Law and Ulpian in Roman Law.

Reiffenstuel cites examples where the stigma of infamy bars one from a prelacy, a benefice, the duties of a judge or magistrate, etc.[26] These laws are found in different places in the Decretals but in every case the penalty of infamy is a disqualification. Hence, to indicate this status of disqualification in every pertinent law a Rule is constructed which briefly states that infamy is a disqualification. The Rule reads: *Infamibus portae non pateant dignitatum.*[27]

[23] Cf. Reiffenstuel, *o. c.*, vol. VII, p. 2, no. 8.

[24] Cousinius, *Receptarum Iuris Utriusque Regularum Partitiones* (Amstelodami, 1645).

[25] D. 50, 17, 1: non ex regula ius sumatur, sed ex iure quod est regula fiat. Cf. Cartagena, *Expositio Titulorum Iuris Canonici* (Lugduni, 1624), p. 481.

[26] *O. c.*, vol. VII, p. 1, no. 3.

[27] Reg. 87, R. J. in VI°.

The Rule merely extracts the common element in various laws which contain disqualifications.

Another example given by Reiffenstuel shows how the law will whenever possible preserve the validity of an act or seek to salvage as much as can be redeemed.[28] Thus bequests made for religious purposes are valid in an otherwise invalid will and donations invalid above a certain sum are valid within a restricted limit. The idea here is that anything which is really useful should not be rendered useless by defects not connected with the item itself. This idea is contained in the Rule: *Utile per inutile non debet vitiari.*[29]

Ulpian gives an example of the construction of a Rule in Roman Law. He says that women cannot be judges or magistrates or act as procurators. These are separate laws but the exclusion of women is a common element. Hence the Rule: *Feminae ab omnibus officiis civilibus vel publicis remotae sunt.*[30]

These examples are sufficient to demonstrate how a Rule extracting an element common to several laws is constructed. There is, however, another way in which a Rule of Law is constructed. The best example is found in Canon Law and is offered by Reiffenstuel.

This method of constructing a Rule of Law establishes a presumption based upon past facts. This presumption must be well founded and give rise to a reasonable conclusion that the actions upon which the presumption is based would be repeated.

Reiffenstuel says[31] that perjurers are not admitted to testify because of the suspicion of further perjury. Again he says that a woman who has left her husband because of his cruelty need not return to him because of the fear of further cruelty. In both cases a presumption of repeated immoral

[28] *O. c.*, vol. VII, pp. 1, 2, no. 5.

[29] Reg. 37, R. J. in VI°.

[30] D. 50, 17, 2.

[31] *O. c.*, vol. VII, p. 1, no. 4.

acts exists. This presumption is contained in the Rule: *Semel malus semper praesumitur esse malus.*[32]

Other examples of the construction of rules can be found in various authors. Reh has a satisfactory discussion.[33]

When Rules of Law are constructed, it is necessary to extract an element which will be applicable in the majority of cases. It is not, however, necessary that a Rule have universal application but, in order to be useful, it should have valid application more often than not.

Rules should be formulated in general terms.[34] This does not imply universal application for the failure of the Rule in separate instances must be studied along with the Rule itself. Thus in the study of Rule 1 of Pope Gregory IX, the exemption of contracts of marriage does not hinder the general application of the Rule that contracts can be broken by mutual consent.[35]

A word should be said about the actual verbal formulation of Rules of Law.

Rules of Law were meant to be memorized. Hence their formulation carefully considered terms which, while accurate, would facilitate the task of memorizing. Beauty and terseness of language are not always found together but it is remarkable how frequently this combination is found in the Rules of Law. It is suggested here that the Rules of Law can advantageously be memorized. Their utility will be enhanced by their ready application.

4) *The utility of the Rules of Law*

The immense utility of the Rules of Law has always been conceded. Bartoccetti, for instance, cites the high praise be-

[32] Reg. 8, R. J., in VI°.

[33] *O. c.*, pp. 38-40.

[34] Cf. Reh, *o. c.*, pp. 40, 41.

[35] C. 1, X, *de regulis iuris*, V, 41: Omnis res, per quascumque causas nascitur, per easdem dissolvitur. Cf. Reiffenstuel, *o. c.*, vol. VII, Reg. I, no. 8.

stowed on these rules by Gothofredus[36] while Reh quotes several commentators who outdo one another on their estimate of the Rules of Law.[37] It might be thought that such praise is extreme especially in view of the excesses committed in the abuse of these Rules.[38] Yet despite these excesses, freely admitted by jurists, the Rules of Law have always been accorded the highest praise when used legitimately and their utility always conceded to be the best.

The utility of the Rules of Law is first found in the excellent training which they undeniably give to students of law. It would be difficult to find anywhere a set of propositions better calculated to engender a legal perspective than the Rules of Law. This is true independently of the several laws upon which the Rules of Law are based. When the knowledge of these laws is added to the concepts yielded by the Rules of Law, it is easily seen how firm is the foundation and how wide is the extension of legal training thus obtained.

The utility of the Rules of Law is found also in the citation of authentic rules as themselves law. Care, however, must be exercised here so that a Rule is not cited where an exception is found.[39] Carelessness in this matter has brought opprobrium on the Rules of Law.

The Rules of Law can also be used as supplementary law. It is stated here that the Rules of Law could be cited to establish at least a presumption upon which a decision could be made.[40] Apropos of this presumption, Reiffenstuel mentions several doctrinal rules formulated by jurists which recognize the validity of the use of the Rules of Law as supplementary law.[41] Where a pertinent law does not exist, a judge was fully

[36] *O. c.*, pp. 15, 16.

[37] *O. c.*, p. 73, footnote 19.

[38] Cf. Bartoccetti, *o. c.*, p. 16.

[39] Cf. Reiffenstuel, *o. c.*, vol. VII, p. 3, no. 14, 15; Bartoccetti, *o. c.*, p. 14.

[40] Cf. Reh, *o. c.*, p. 71.

[41] Regulae standum est, donec contrarium probetur. Regulae inhaerendum est, donec de fallentia constet. Ratio sumpta ex regula fortissima est. Qui

authorized to decide a question according to a Rule of Law.

Earlier insistence was made on the proper grasp of the meaning of a Rule of Law and its relationship to the law itself. This insistence cannot be made too often. Nor can the proper place of the Rules of Law be stressed too frequently. Students should not be trained to speak in legal proverbs but they should be well grounded in the law which gave rise to these proverbs.[42] If the proper perspective be sought and attained no abuse will attend the use of the Rules of Law. Their utility will be thus enhanced. Students of law will thus be appreciably aided.

The Rules of Law of Pope Boniface VIII

While Pope Gregory IX included 11 Rules of Law at the end of his Decretals [43] and some of these Rules are cited in the footnotes to the canons of *The Code of Canon Law*,[44] by far the greater citation are of the Rules of Law of Pope Boniface VIII. These are found at the end of the Decretals of this Pope.[45] There is no greater intrinsic worth in the Rules of Law of Pope Boniface VIII which would make them preferable to the Rules of Law of Pope Gregory IX. But the Rules of the former Pontiff are carried over a wider field of legal matters which naturally makes their use more frequent. The number of the Rules of Law of Pope Boniface VIII far exceeds the number of the Rules of Law of Pope Gregory IX. The Rules of the former Pontiff number 88. Bartoccetti discusses whether there is a mystical significance in the determi-

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habet regulam pro se, dicitur fovere ius certum. Regulae iuris sunt tenaces, a quibus in dubio recedendum non est. *O. c.*, vol. VII, p. 3, no. 13.

[42] Reh, *o. c.*, p. 69, has an interesting account of the function of the Rules of Law in the perfection of the art of jurisprudence.

[43] X, *de regulis iuris*, V, 41.

[44] E.g., Reg. 1 to cc. 30; 71; 82; 86; 187; 366, § 2; 371; 1573, § 5; 2253, 3°: Reg. 5 to cc. 185; 572, § 1, 6°; 1087, § 1: Reg. 10 to c. 2209, § 6.

[45] R. J., in VI°.

nation of this number.[46] Such discussion will scarcely result in profitable instruction. The reader can, if he will, read Bartoccetti.

Several points should be indicated in this article relative to the Rules of Law of Boniface VIII. Their origin and use, their failure and their abuse should be discussed. In addition to these points, some reference should be made to the jurist to whom they are credited and some remarks set down on the bibliography of the Rules of Law.

The following remarks will concern mostly the Rules of Law of Pope Boniface VIII. Adequate application can be made by any serious student of whatever is said about these Rules in general to other Rules in both Canon Law and Roman Law.

1) *The origin of the Rules of Law*

The Rules of Law of Pope Boniface VIII are found textually for the most part in Roman Law. Beste is not accurate in saying that these rules came from Roman Law in the sense that every Rule is found there.[47] In the same way the annotator of Ferraris' monumental work, "*Prompta Bibliotheca*", errs in saying that these Rules are not taken from the Decretals.[48] Some of the Rules are found verbally in the Decretals while others contain a summary of the legislation there recorded.

There are three sources of the Rules of Law.[49] The most prolific source is Roman Law. In many cases the exact text or almost the exact text is set down as a Rule in Canon Law. These are Rules 6, 14, 19, 20, 24, 25, 30, 33-37, 40, 44-46, 49-51, 54, 56, 59, 62-65, 67, 78-80, 83, 85, 87, 88. In some other instances the Rule in Canon Law is a restatement of the

[46] *O. c.*, pp. 29-31.

[47] *O. c.*, p. 26.

[48] *Prompta Bibliotheca Canonica, Iuridica, Moralis, Theologica, necnon Ascetica, Polemica, Rubricistica, Historica* (Romae, 1885), ad verb. "regulae iuris".

[49] The source of each Rule of Law is given by Reiffenstuel, *o. c.*, vol. VII, at the beginning of his discussion of each Rule. Bartoccetti also, *o. c.*, gives the sources of the Rules and frequently the text where the source is found.

Roman Law. These are Rules 7, 11, 13, 18, 22, 26-28, 38, 47, 53, 55, 60, 61, 66, 68, 70-74, 77, 82, 86.

Canonical legislation is also a source of the Rules of Law. Here, too, the Rule is at times a textual statement taken from the law of the Decretals. These are Rules 9, 10, 42, 81. At other times the Rule contains a summary of canonical legislation. These are Rules 1, 8, 16, 39, 41, 69, 84.

The moral law is the third source of the Rules of Law. These are Rules 2, 3, 4, 5, 12, 48, 52. Rule 48 is derived from the moral law but its formulation is found rather in Roman Law.[50]

2) *The author of the Rules of Law*

Although some doubt exists in regard to who actually compiled the Rules of Law, this work is usually accredited to Dino Rosoni.[51]

Dino Rosoni was born probably in Mugello in 1253 and died according to Reh in 1303. The place of his death is unknown but he was buried for a while in Bologna and later entombed in Pistoia.

Dino Rosoni was highly esteemed during his life as a student and professor of law. He taught for five years at Pistoia and later at Bologna. His reputation is attested by the judgment *Dini disputatio in proverbium ivit.* Dino Rosoni was married to a woman named Bice who later entered a convent of nuns. In 1297 Dino Rosoni came to Rome summoned by Pope Boniface VIII who desired to improve the study of law in Rome. Probably at this time, Dino Rosoni compiled the Rules of Law. Some disappointments inevitably fell to the lot of Dino Rosoni and he left Rome. His further life is for the most part unknown.

[50] D. 50, 17, 206. Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem.

[51] Various spellings of this name occur, e.g., Dino de Rossonibus, Dino de'Rossoni, etc. The spelling in the text is offered by Bartoccetti, *o.c.*, p. 23, from whom the biographical details are borrowed. Reh, *o.c.*, p. 13, footnote 29, gives several Latin variations, Dinus de Rossonibus, de Rossonis, and Dinus or Dynus a Mugello, Mugellanus or Muxellanus.

Dino Rosoni left many manuscripts which went principally under the names *Repetitiones* and *Disputationes*. His commentary on the Rules of Law was probably his last work. The manuscripts of Dino Rosoni, according to Bartoccetti,[52] are found not only in Italy but also in France, Germany and England.

The works of Dino Rosoni were universally esteemed. His style was logical and dialectical. He paid great reverence to the author of the Glossa on the Civil Law but he did not hesitate to differ from the renowned Accursius. Dino Rosoni was even compared by Verini to Accursius himself.[53] Comparisons between Dino Rosoni and Papinian were not overlooked. The Humanists also accorded praise to Dino Rosoni and his influence was great in that he himself was much in debt to Aristotle. His work, *Modus arguendi,* was perhaps the first of its kind. It is easily seen that a jurist of this eminence would deserve the praise *Primi ex antiquis Dyno debentur honores. Interpres legum maximus hercle fuit.*

Dino Rosoni's own appreciation of the Rules of Law is found in his prologue to the Rules.[54] This can be stated briefly.

Dino Rosoni says in effect that a rule is a short statement of the law. It is constructed from the law. It has not the function of law although because of identical reasons it can be used as law where no specific ordinance is at hand.

3) *The utility of the Rules of Law*

Everything which was said earlier about the Rules of Law in general could be repeated here in regard to the Rules of Law of Pope Boniface VIII. Yet greater stress should be placed upon these Rules because of their immediate use in the interpretation of Canon Law. With all the best intentions in the world, everyone cannot be adequately trained in Canon

[52] *O. c.,* pp. 25, 26.

[53] Ingenio pari Dinus successit et illi aemulus. Cf. Bartoccetti, *o. c.,* p. 27.

[54] Cf. Bartoccetti, *o. c.,* pp. 27-29.

Law. The study of the Rules of Law, their application and possible adaptation will greatly aid in the interpretation of Canon Law. A professor who is able and willing to expound the Rules of Law will confer an inestimable benefit on his students. This should really need no emphasis. But at the same time it should be remembered that a mere recommendation to learn and digest the Rules of Law without class-room exposition is a hazard which is not lightly to be estimated.

Students of Canon Law who possess a good knowledge of law can be trusted to learn and digest these Rules. Their need for professorial guidance is not as great as is that of students who have not acquired an ability to think in terms of law. It must not be thought that the memory of a number of canons permits one to employ the Rules of Law correctly. In order to acquire the knowledge of the Rules of Law much legislation must indeed be known but more than this is necessary. What is necessary is the ability to extract from legislation the common element from several laws.

The utility of the Rules of Law is closely bound to the training required in order that a student of law may think correctly in legal matters. For instance, it is of the utmost importance to distinguish between an obligation and the manner in which is should be performed. It is of equal importance to determine where the presumption in law lies, where the law sets up a norm to follow and when departure from this norm is permissible. Mention should also be made of the training of the student of law in the fundamental binding force of all law, civil and ecclesiastical. In this latter point alone, the correct grasp of the text of Rule 6 [55] with its application in human law and its failure in divine law will go a long way toward establishing a foundation in the training of students of law. At the same time, an incorrect or superficial acquaintance with this Rule leads to unwarranted and absurd interpretations of law.

[55] Nemo potest ad impossibile obligari.

In regard to the training of students of law there is scarcely a point of importance which cannot be adequately expounded by the use of one or more Rules of Law. This idea is not exaggerated. Experience reveals the bountiful fruit of the study of the Rules of Law.

A few words should be said here to professors of law. Those professors who have not been called upon to expound Canon Law until they were thoroughly trained and have had ample time to reflect upon and ponder over the wide field of canonical legislation will readily have seen the utility of the Rules of Law. Other professors who have been asked to assist in an emergency and who have not had ample time to permit their knowledge of Canon Law slowly to integrate itself will find the Rules of Law excellent material to develop this integration. After all, the work of the professor is different from the work of the chancellor or secretary. The latter two may be called upon to render judgments immediately upon request. Hence their knowledge should be sufficient in regard to the textual content of the canons. A professor, however, does not normally operate under such pressing conditions. He usually has sufficient time to prepare lectures in order to point out applications, comparisons and contrasts. No better aid in discharging this duty can be found than a real knowledge of the Rules of Law. Lectures improve when they are permeated by the professor's grasp of the fundamental concepts of the Rules of Law.

4) *The use of the Rules of Law*

There are two ways in which the Rules of Law can be used in their relation to Canon Law. The first is their use in the interpretation of the canons of the Code, the second is their use as supplementary law according to the prescription of canon 20. Both considerations are of importance and sufficient attention should be paid to these rules in every study of Canon Law.

a) *The use of the Rules of Law in the interpretation of the text of the canons of the Code*

In his study of the Rules of Law, Reh rightly insists on the use of these rules in the interpretation of Canon Law.[56] There is no counterpart in the Code to the Rules of Law. As Reh says [57] the canons of the first book of the Code are not Rules of Law. While the canons of this book do supply norms which control the whole field of Canon Law, they are not constructed to do what the Rules of Law in the Decretals did. Individually some of these canons can be used as were the Rules of Law [58] but as a series of canons this cannot be said. For the most part these canons descend to too many details to be used as Rules of Law.

Very few of the Rules of Law are actually incorporated in *The Code of Canon Law* as laws. There are only three canons which are textually Rules of Law. These are canons 74, 101, § 1, 2° and 2219, § 1. Canon 74 uses the pronoun *ipsa* instead of the noun *persona*. This is the only change in the text of Rule 7.[59] Canon 101, § 1, 2° adds the phrase *uti singulos* to Rule 29 [60] clarifying the use of this Rule. This clarification is the result of jurisprudence and was already the common opinion at the time of Reiffenstuel.[61] Canon 2219, § 1 repeats exactly Rule 49.[62] Reh says the textual difference between canon 1512 and Rule 2,[63] canon 1669, § 2 and Rule 20 [64] and

[56] *O. c.*, pp. 76-80.

[57] *O. c.*, p. 77.

[58] E.g., cc. 17, § 1, § 3; 22; 25; 29; 36; 40; 49; 67; 74; 80; 84.

[59] Privilegium personale personam sequitur et extinguitur cum persona.

[60] Quod omnes tangit debet ab omnibus probari.

[61] *O. c.*, vol. VII, Reg. XXIX, no. 5; cf. also Bartoccetti, *o. c.*, p. 100.

[62] In poenis benignior est interpretatio facienda.

[63] Possessor malae fidei ullo tempore non praescribit.

[64] Nullus pluribus uti defensionibus prohibetur.

canon 1537 and Rule 51 [65] is negligible.[66] This is in a sense true of the similarity between canon 1669, § 2 [67] and Rule 20 and it is remarkable that this Rule is not cited as a footnote to canon 1669, § 2. The textual similarity, however, between canon 1512 [68] and Rule 2 is not too evident. The complete meaning of the Rule is indeed contained in canon 1512 but the textual similarity is questionable. The same criticism can be made of the asserted textual similarity of canon 1537 [69] and Rule 51. The same concept is found in canon 1537 and Rule 51 but there is little textual similarity. Reh, however, correctly points out the relationship between canon 16, § 1 [70] and Rule 13 [71] and canon 19 [72] and Rule 15.[73] Reh offers other examples but these two suffice to illustrate the point he advances.[74]

The footnotes to the canons of the Code contain over two hundred citations of the Rules of Law. Not every Rule is cited but the majority is cited at least once. Detailed work in the number of citations has been well done by Reh.[75] Bartoccetti comments on the relative scarcity of actual citations of the Rules of Law.[76] His observation is sound for a Rule of Law is not the source of law. The footnotes to the canons of the Code should indicate the source of the law not

[65] Semel Deo dicatum non est ad usus humanos ulterius transferendum.

[66] *O. c.*, pp. 77, 78.

[67] Reus non prohibetur pluribus exceptionibus etiam contrariis uti.

[68] Nulla valet praescriptio nisi bona fide nitatur, non solum initio possessionis, sed toto possessionis tempore ad praescriptionem requisito.

[69] Res sacrae ne commodentur ad usum qui earumdem naturae repugnat.

[70] Nulla ignorantia . . . excusat etc.

[71] Ignorantia facti non iuris excusat.

[72] Leges quae poenam statuunt . . . strictae subsunt interpretationi.

[73] Odia restringi et favores convenit ampliari.

[74] *O. c.*, p. 78.

[75] *O. c.*, p. 78, footnote 11; cf. also Bartoccetti, *o. c.*, pp. 205, 206.

[76] *O. c.*, pp. 37, 38.

the means of interpreting the law. Even though in the Decretals the Rules of Law could be considered laws, their very nature as a compendium or short statement of the law precludes their frequent use as a source of law in *The Code of Canon Law.* Bartoccetti adds that the Rules of Law in many instances refer to contracts of one kind or another. Since *The Code of Canon Law* adopts the civil law in these matters[77] no occasion is offered for the citation of some Rules of Law.[78]

Nevertheless there are places where one or the other Rule might have been cited. The best example was mentioned earlier in regard to Rule 20. This Rule is certainly the source of canon 1669, § 2. The citation of Rule 29 is made but twice.[79] It occurs textually in canon 101, § 1, 2°. It is cited under canon 526. This is the extent of the actual citation of Rule 29. But this Rule could have been cited oftener. Bartoccetti suggests that it might have been cited under canons 575, § 2, 583, 650, § 2, 667, and 715.[80] Bartoccetti mentions two canons where Rule 29 should certainly have been cited.[81] These are canon 162, § 2, where the invalidation of an election must be made because a voter was ignored and canon 1470, § 1, 1°, where the law governing the renunciation of the right of patronage is found. It is difficult to see why Rule 29 was not cited under these two canons for its use as a source of law is obvious.

In proportion to the number of canons contained in each book of *The Code of Canon Law,* the first book has the largest number of citations.[82] This indicates the great use of the

[77] Cf. c. 1529.

[78] E.g., Rules 9, 10, 32, 36, 50, 56, 57, 62, 66, 83.

[79] Quod omnes tangit debet ab omnibus probari.

[80] *O. c.*, p. 101.

[81] *O. c., l. c.*

[82] Actually the number of citations in the first book is forty-two. This is the lowest number of citations in any book of the Code but, in proportion, this is the largest citation. Cf. Reh, *o. c.*, p. 78; Bartoccetti, *o. c.*, pp. 205, 206.

Rules of Law in furnishing the basis upon which these canons are constructed. Hence, as an aid toward the correct interpretation of these canons, the use of the Rules of Law is apparent.

But in addition to this clear application of the Rules of Law, it can also be pointed out that in the study of the various departments of Canon Law, the investigation of the concepts found in these Rules is extremely useful. Thus, for instance, the concept of Rule 1 [83] furnishes the foundation for the whole law of ecclesiastical benefices. Respect for the sanctity of persons and things dedicated to the service of God is expressed in Rule 51[84]. Again, the responsibility for objects held in trust is supported by Rule 36.[85] Again, the law which demands that duty and remuneration be comparable is found in Rule 55 [86] and Rule 77.[87]

In addition to these examples, the fundamental obligation to obey law is better understood by the grasp of Rule 6 [88] and the mere verbal compliance with law is condemned in the concept of Rule 88.[89]

b) *The use of the Rules of Law as supplementary law.*

Canon 20 determines how a norm is provided when the law itself is silent. It is obvious that no Code of Law can legislate for every item.[90] Hence, it is necessary that the law set up a rule where a norm can be found. This is the function of canon 20. This is the only canon which fundamentally determines what is to be used as supplementary legislation. There-

[83] Beneficium ecclesiasticum non potest licite sine institutione canonica obtineri.

[84] Semel Deo dicatum non est ad usus humanos ulterius transferendum.

[85] Pro possessore habetur qui dolo desiit possidere.

[86] Qui sentit onus sentire debet commodum et e contra.

[87] Rationi congruit ut succedat in onere qui substituitur in honore.

[88] Nemo potest ad impossibile obligari.

[89] Certum est quod is committit in legem, qui legis verbum complectens contra legis nititur voluntatem.

[90] Cf. Cartagena, *o. c.*, p. 480.

fore, if no indication of it is given in this canon no law, old or new, canonical or civil, can be legitimately used as supplementary legislation. It is for this reason that the law of the Decretals as a body of law is not supplementary legislation according to canon 20. Nowhere in this canon is this body of law recognized as supplementary legislation. It is not proper to associate canon 6, 2° with canon 20 for canon 6, 2° refers to earlier legislation actually contained in *The Code of Canon Law*. The very purpose of canon 20 is to determine a norm where the law is deficient.

It is quite clear, then, that as laws of the Decretals, the Rules of Law cannot be used as supplementary legislation. As laws of earlier legislation, the Rules of Law are no different from the Decretals themselves.

But can the Rules of Law be used as principles of law and thus furnish a norm according to canon 20? [91]

It is the opinion of canonists that the Rules of Law can be thus used.[92] It is disputed whether all the Rules of Law, no matter what source, are included in the phrase *a generalibus iuris principiis* [93] but there is no doubt that the canonical Rules of Law are included even though their historical source is frequently Roman Law.

Principles of law as the phrase is used in canon 20 must mean broad concepts of positive law. This phrase cannot mean moral principles because of the clause which accompanies this phrase *cum aequitate canonica servatis*. This clause, as Van Hove observes, is taken from a Decretal of Pope Honorius III [94] where the Pope demands that a mild position is always to be maintained.[95] If principles of law as

[91] . . . norma sumenda est . . . a generalibus iuris principiis.

[92] Cf. e.g., Michiels, *Normae Generales Juris Canonici* (Lublin, 1929), vol. I, p. 469; Van Hove, *o. c.*, p. 327; Vermeersch-Creusen, *o. c.*, tom. I, p. 120; Reh, *o. c.*, pp. 81-83.

[93] Cf. Van Hove, *o. c.*, p. 327.

[94] *O. c.*, p. 330.

[95] . . . procedas aequitate servata, semper in humaniorem partem declinando.

understood in canon 20 mean moral principles and not broad concepts of positive law, it is difficult to see why mercy should be stressed since this quality should be taken for granted. There is, however, a definite reason for adding a clause indicating mercy when a concept of law is used as a principle. In this way the legal concept takes on an aspect which characterizes all canonical legislation. This reason could also be adduced for the opinion which would include all Rules of Law, no matter of what system, as supplementary legislation. This discussion, however, is beyond the purpose of this article.

The use of the Rules of Law as supplementary legislation is really the result of analogy. It is not, however, the same analogy of law which proceeds from similar legislation. Such analogy is legitimate according to canon 20[96] but it presupposes an existing law the tenor of which is similar to the situation at hand. In the use of this analogy, the canonist goes beyond but not contrary to the intention of the legislator. If the latter should occur, the analogy is worthless. Thus, for instance, according to canon 20 an analogy must not include penalties.[97] Van Hove properly excludes invalidating clauses from analogies[98] in his interpretation of canon 11. Undoubtedly this canon also controls the norm determined by the operation of canon 20.

The analogy used in the application of the Rules of Law proceeds not from any one law but from the common element or concept drawn from many laws. These laws need not be similar in the content. All that is necessary is that they contain one element which is common to all. This element has been constructed as a Rule of Law. Hence, when this Rule of Law is used according to canon 20, no law from which it has been partially derived is applied. One of the ideas contained in the several laws is used, but the law itself

[96] . . . norma sumenda est . . . a legibus latis in similibus.

[97] . . . norma sumenda est . . . nisi agatur de poenis applicandis.

[98] *O. c.*, p. 331.

is in no way applied. Thus this analogy differs from the analogy discussed in the preceding paragraph.

It should not be objected that since the Rules of Law were included in the Decretals, their application in canon 20 is really the same analogy as found in similar legislation. The important difference is that similar legislation is exactly that. No fundamental rule or principle is enunciated. The matter of the law is itself suitable for further application. In the use of a Rule of Law, there is no similarity of matter for the Rule is not a material disposition but a legal concept. This is an important difference. This likewise explains why similar legislation is preferred in canon 20 to principles of law. Since the legislator has expressed himself in legislation, he can, therefore, be presumed to have the same will when supplementary legislation is necessary. This presumption in material details is not present in the Rules of Law. The legislator has approved the concepts found in the Rules but this is not the same as indicating his will in detailed material applications of these Rules. Hence, according to canon 20, similar legislation is preferred to the use of principles of law. There still remains, however, much room for the application of the Rules of Law in canon 20.

5) *The adaptation of the Rules of Law*

Adaptation of the Rules of Law is not the same as their application. The first use, of course, of the Rules of Law is their application; adaptation is a later process which requires more skill and is constantly attended by hazards.

The justification for the adaptation of the Rules of Law is based upon their broad far-reaching concepts. The Rule itself is a product of extraction, adaptation is broader and reaches even farther afield. Admittedly, a study of the adaptation of the Rules of Law is hazardous. There is always the temptation to read into the Rule what is not there contained. Too frequently verbal adaptation is possible without any real foundation for this process. Nevertheless, the process itself

is legitimate and when carefully done is an excellent aid in correctly understanding the law and properly interpreting it.

Adaptation consists in using the fundamental concept of a Rule of Law in a way not contemplated in the application of the Rule. It is evident that considerable legal knowledge is necessary before correct adaptation can be made. Naturally, some Rules of Law are better subjects for adaptation than others. Rules 4 and 5,[99] for instance, will scarcely admit any adaptation at all while Rule 57 [100] is perhaps better known in its adaptation to the interpretation of laws than in its application to contracts. Whenever an effort is made to adapt the Rules of Law, extreme caution should be exercised.

Two Rules of Law are selected to illustrate how the adaptation of a Rule is accomplished. These are Rules 37 and 57.

Rule 37: *Utile per non utile non debet vitiari,* has wide application. It means that anything which is of itself or by law valid is not to suffer invalidity through its connection with invalid items. Reiffenstuel says [101] that this Rule is based upon the common intention to preserve validity whenever possible. The tendency is always to restrain invalidity and to contain it in as narrow a margin as possible. No one will quarrel with this statement of Reiffenstuel. Certainly, if one acts in a normal way, he will not deliberately perform invalid acts. What invalidity does arise frequently comes from positive legislation which overrules the will of private persons for the protection of the community. This is proper. The welfare of the community is to be preferred. But, by the same argument, the legislator does not intend to invalidate more than is necessary for this purpose. Hence, the meaning of Rule 37 is clear. The concept of this Rule is common to the laws which, e.g., control testaments, donations,

99 Peccatum non dimittitur nisi restituitur ablatum. Peccati venia non datur nisi correcto.

100 Contra eum qui legem dicere potuit apertius est interpretatio facienda.

101 *O. c.,* vol. VII, Reg. XXXVII, no. 3.

documents, etc. It is to these matters that direct application of Rule 37 is made.

With this direct application in mind, adaptation of Rule 37 is sought in a wider field of law where the solid and fundamental benefit of law should not be hindered by the particular obligation of an individual statute. Everyone will admit that the whole body of law should be beneficial to the community. Everyone will likewise admit that particular statutes unless they contribute to this welfare are worthless. If it be supposed, then, that a statute is too difficult to observe, no one within the provisions of Canon Law [102] at least will deny the possibility of a contrary custom ultimately cancelling the statute. Here is an instance where the usefulness of all law must not be impaired by the uselessness of a particular statute. This is nothing more than an adaptation of Rule 37. The useful is not to be injured by the useless.

When an adaptation of a Rule of Law is made, especially in the example at hand, care must be exercised not to confuse the major benefit of a law with the major benefit one would like to enjoy. If the comparison or contrast runs always with the consideration of major and minor, the correct estimate of these quantities must always be made. The major benefit of the law may be found in the protection which the legislator specifically grants the community. This can be so harmed by a comparatively minor defect that the legislator considers this defect serious enough to invalidate acts. An example is found in canon 1894, 4° [103] where the omission of proper date and place of a judicial sentence renders the sentence invalid. Once again, it should be stressed that the comparisons or contrasts must be strongly considered.

Rule 57: *Contra eum, qui legem dicere potuit apertius, est interpretatio facienda,* is one of the better known Rules of Law and its use is far more common in its adaptation to all

[102] Cf. c. 27, § 1.

[103] Sententia vitio sanabilis nullitatis laborat, quando, . . . 4° Non refert indicationem anni, mensis, diei et loci quo prolata fuit.

laws than in its application to all contracts. This is undoubtedly due to the term *legem* in the Rule.

The direct application of Rule 57 is to the conditions and obligations of a contract.[104] This Rule is not cited at all in *The Code of Canon Law* although it is quoted by canonists[105] in their interpretation of canon 15.[106] This interpretation rests upon the adaptation of Rule 57 and in no way upon its application to canon 15.

Rule 57 presupposes that the the parties of a contract have sufficiently thought out and discussed and finally agreed upon the conditions and obligation of a contract. These should be set down in the contract in clear and unmistakable terms. If this is not done, Rule 57 can be applied so that the party who could have clarified the terms must suffer whatever loss is entailed in an adverse or less promising interpretation of these terms.

Adaptation of Rule 57 transfers the responsibility of clear terms to the law of the legislator. He, too, is expected to speak in clear and unmistakable terms so that the obligation he wishes to impose is clearly identified. The legislator, however, can presume that technical terms will be known.

Before Rule 57 can be adapted to the obligation of law, a doubt must arise concerning the meaning of the law. Doubts also of the existence or duration of the law are also of importance here.[107] Any kind of a doubt of law comes within the adaptation of Rule 57.

It should be remembered that the adaptation of Rule 57 to doubts of law is not based on the term *legem* in the Rule. This term has a technical meaning in Roman Law[108] from

104 Reiffenstuel, *o. c.*, vol. VII, Reg. LVII, no. 2.

105 E.g., Cicognani, *Commentarium ad Librum I Codicis* (Romae, 1925), p. 108; Michiels, *o. c.*, vol. I, p. 335.

106 Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent.

107 Cf. Van Hove, *o. c.*, p. 236.

108 Veteribus placet pactionem obscuram vel ambiguam venditori et qui locavit nocere, in quorum fuit potestate legem apertius conscribere: D. 2, 14, 39.

which Rule 57 is derived. It has no reference at all to a law in the source of Rule 57. It means a condition or an obligation which is part of a contract. This idea is not applicable directly to the obligation and meaning of law.

The adaptation of Rule 57 to doubts of law proceeds from the responsibility which the legislator has to make his laws clear. This responsibility is part of his office. He has no right to expect obedience to laws which are doubtful. It is the doctrine of St. Thomas that no one is bound by a precept without knowledge of this precept.[109] This idea, however, is fundamentally natural law.

The above notes are written in the hope that adaptation of the Rules of Law will proceed legitimately. It is poor law to apply a Rule when it can only be adapted. Rules must be used cautiously and not stressed beyond their worth. Adaptation of the Rules of Law is a useful aid in the understanding of the law and in its interpretation. Such aid should not be lightly put aside merely because of its hazards.

6) *The misuse of the Rules of Law*

If it cannot be doubted that the Rules of Law are useful aids in the interpretation of law, it must be admitted that these Rules are at times misused and even abused. The latter defect needs no discussion. If one abuses the Rules of Law through ignorance there is little more to be said than either to protest such absurdities or to doubt whether the culprit has really received any training in law. The serious student of law will never be guilty of abuse.

There is, however, a misuse of the Rules of Law which is regrettable but does not involve bad will. This defect arises mostly from a desire for simplification. What results is oversimplification.

The Rules of Law are not catchwords or epigrams. Their casual citation is regrettable. They should not be quoted

[109] Nullus ligatur per praeceptum aliquod nisi mediante scientia illius praecepti. *De Veritate*, q. 17, art. 3.

unless one knows the law from which the Rules are taken. This naturally enjoins serious study of the historical sources in Roman Law where most of the Rules were originally formulated or in Canon Law where other Rules are found. In no sense at all is the knowledge of the Rules of Law supposed to curtail serious study. Perhaps no clearer indication is given of the excellent or inferior training in law than by one's use of the Rules of Law. There are opportunities when these Rules can be used properly and there are occasions when they should not be cited. The Rules of Law are not short cuts to legal knowledge.

Even when there is really no question about the serious and honest effort to acquire the knowledge of or to expound the contents of law, caution must constantly be employed to guard against the misuse of the Rules of Law. Reputation is no guarantee against the misuse of these Rules. Even so renowned a canonist as Van Hove occasionally fails in the application of these Rules of Law.[110] Bartoccetti also is at times inaccurate.[111] It may also be recalled here how often Rule 57 is said to be applied when in reality adaptation is meant.

Unfortunately, there was a time when the Rules of Law were ignored as a suitable aid in the study of law. Whatever disregard these Rules suffered in the past was the result of abuse and misuse which naturally led serious students to suspect the efficacy of these Rules. Fortunately, the Rules of Law are regaining their rightful place in the study of law. Dissertations on these Rules, such as that of Reh, should be

[110] *O. c.*, p. 331. Van Hove uses Rule 28 to support the denial of the transfer of penalties or invalidating clauses from established law to supplementary legislation according to canon 20. At first sight, Rule 28 might be applied but in reality Rule 28 is inapplicable because it refers to dispensations, rescripts and favors contrary to the general law. In no way does it refer to disabilities, penalties or disqualifications. This is clear in Reiffenstuel, *o. c.*, vol. VII, Reg. XXVIII, no. 5, where the argument proceeds from the source of the Rule in Roman Law (D. 50, 17, 141).

[111] *O. c.*, p. 99. Bartoccetti does not openly apply Rule 28 to the non-transfer of penalties, etc., but he does group these disabilities with privileges, exemptions and dispensations which are not to be extended to others.

encouraged. Much good will result from satisfactory studies of the Rules of Law. Much harm will result if untrained men are allowed to use them.

7) *The failure of the Rules of Law*

If it be kept in mind that the Rules of Law are for the most part short statements of positive law, it will not be surprising that the Rules suffer exceptions. These exceptions are usually indicated as *fallentia regulae, fallit regula, fallitur.* The following few lines will consider these exceptions and show where they may be recognized. It is unnecessary to state that the exceptions to the Rule must be learned with the knowledge of the Rule itself. Where a Rule does not suffer exceptions these remarks are, of course, superfluous.[112]

Objections to the validity of the Rules are not exceptions to their extension. These objections sometimes arise from difficulties in the text of law from which the Rule is taken and at other times objections are really poor applications of the Rule. In every case where an objection is honestly and successfully encountered, the force of the Rule is otherwise stressed. An exception to the Rule, however, curtails the use of that Rule. To use the Rule in this case is improper.

Exceptions to the applications of the Rules of Law arise from the fact that the various laws from which the Rules are taken are mostly positive and at times similar legislation. If these laws were divine laws, or if they were identical laws, no exceptions would either be permitted or discovered. But since human legislation, although constant in tendency, does in actual fact vary, what is made a matter of law in one instance may not be such in another. Again, what may be established for the protection of individual members of a society in so far as it merely touches their private welfare, can be sacrificed by these members voluntarily. Further, the privileged position in law of the Church, donations to it, responsibility for its welfare, etc., all work at times for an exception to the Rule of

[112] E.g., Rules 5, 6, 77, 79, 86, 88.

Law where the Church is involved. Lastly, whenever a higher law determines a fact, the lower Rule of Law will suffer an exception. Perhaps the best example of this last point is found in the consideration of Rule 1 in the Decretals of Pope Gregory IX.[113] This Rule indicates that the dissolution of agreements is made by the removal of the causes upon which they were based. An exception to this Rule is found in the contract of marriage. Here the divine law curtails the operation of human law. Every commentator on the Rules of Law should adequately consider the exceptions to the Rules of Law along with their application. Reiffenstuel[114] is particularly satisfactory in this matter. The older commentators made the study of exceptions to the Rules as important as the study of the Rules themselves. This attitude is worthy of imitation.

As is obvious, very few exceptions to the Rules of Law will be found in the canons of the first book of *The Code of Canon Law* because these canons themselves enunciate norms. Exceptions, however, can be found where the Rules are studied in relation to the Canon Law of the Sacraments. An important exception was already mentioned. An exception to the same Rule can likewise be found where the law of permanent religious profession is stated. The reduction of the cleric to the lay state and the reduction of consecrated churches to profane use are both examples of exceptions to Rule 51.[115] Valid acts performed contrary to merely prohibitory laws are exceptions to Rule 64.[116]

Some of the Rules of Law easily will admit exceptions. Rule 43, for instance,[117] which is derived from the omission of the normal resistance one would display in certain matters will frequently be overthrown either because one cannot at

[113] Omnis res, per quascumque causas nascitur, per easdem solvitur; c. 1, X, *de regulis iuris*, V, 41.

[114] *O. c.*, vol. VII, passim.

[115] Semel Deo dicatum non est ad usus humanos ulterius transferendum.

[116] Quae contra ius fiunt, debent utique pro infectis haberi.

[117] Qui tacet consentire videtur.

the moment indicate disagreement or because the refusal to speak is too quickly assumed. Rules such as Rule 43 must be used sparingly. Obviously, the more frequently an exception can be demonstrated, the less valuable is the Rule of Law. All the Rules, however, must be valid in the majority of cases. Otherwise they cannot be Rules of Law.

8) *The bibliography of the Rules of Law*

No study of the Rules of Law could be considered complete without a review of the essential bibliography to be consulted.

No attempt will be made here to supply a thorough list of books to be read. This has already been done in the excellent bibliography offered by Reh.[118] Every commentator worthy of mention at all who has discussed the Decretals of Pope Gregory IX and Pope Boniface VIII has considered the title *De Regulis Iuris.* Sometimes the commentary has been brief and of no considerable importance, at other times, serious and extended attention was given to the Rules of Law. Opinion is almost unanimous in determining the sources of the Rules[119] and in describing their function. Hence, the study of one reliable canonist would normally be sufficient for the fundamental notions regarding the Rules of Law. This is fortunate, for the student will not begin his study burdened with divided opinions. He can with a sure foundation approach the Rules of Law with a settled view regarding their essential application.

All that will be mentioned here will be a brief review of works the study of which will bring definite aid toward a correct understanding and use of the Rules of Law.

a) The Glossa on the Rules of Law is fundamental to the study of these Rules.[120] In the Glossa, the numerical order of the Rules is followed. The painstaking detail of the Glos-

[118] *O. c.,* pp. 87-98.

[119] Reh, *o. c.,* p. 25, discusses the opinion of Hatoman who advances his own view regarding the Rules of Law.

[120] *Decretales D. Bonifatii VIII suae integritati una cum glossis restitutae* (Romae, 1572).

sators is evident in their discussion of cases to which the Rules apply and also to cases to which the Rules are exceptions. The commentary runs mostly along the line of verbal exposition. This commentary is fairly even although some of the Rules are discussed very briefly.[121] There is frequent citation of Dino Rosoni.[122]

b) Of the earlier commentators on the Rules of Law, Joannes Andreae must be consulted.[123] The Rules are discussed not in their numerical order but in alphabetical order; the first letter of the first word in the Rule determines the position of the Rule in this commentary.[124] Each Rule is preceded by a summary of the commentary to follow. Discussion consists of a commentary on the text of the Rule. This is followed by a *questio* where the solution of points regarding the Rule is found. After a Rule is discussed in its alphabetical order, the Rules of Law in Civil or Roman Law are printed in the same alphabetical order. Not much commentary is found on the concept of a Rule of Law but what is given is satisfactory.

c) The commentary of Petrus Peckius on the Rules of Law [125] must be mentioned because he is least of all influenced by the jurisprudence of Canon Law in his interpretation of the Rules of Law in Canon Law which had their actual source in Roman Law. The viewpoint of Roman Law is for the most part retained. This is especially true in Peckius' discussion of Rule 64.[126] Because Peckius is not truly representative of canonical jurisprudence in the interpretation of the Rules of Law of Pope Boniface VIII, he must be used with caution.

121 E.g., Rule 15.

122 E.g., Rules 13, 16, 64, 68.

123 *In Titulum de Regulis Iuris novella Commentaria* (Venetiis, 1581).

124 Rule 42, Accessorium naturam sequi congruit principalis; Rule 50, Actus legitimi conditionem non recipiunt neque diem.

125 *Opera Omnia: De Regulis Juris* (Antverpiae, 1666).

126 Quae contra ius fiunt, debent utique pro infectis haberi.

His opinion alone cannot be taken as indicative of the common doctrine of his day.

d) The commentary of Augustinus Barbosa is noteworthy.[127] In this commentary a summary is given before the commentary itself, provided the latter is long enough to be summarized. The Rules of Law, considered in their numerical order, are, generally speaking, given less commentary than by Joannes Andreae. The commentary, however, is more readable for there are fewer abbreviations. Some Rules have a short commentary, e.g., Rules 54, 55, and 71. The commentary is uneven for in some instances, e.g., Rule 64, commentary is almost entirely a citation of authors. On the other hand, Rule 70 is given an extended commentary.[128] Barbosa says little about the concept of a Rule of Law but he gives three rules regarding the use of a Rule of Law. These are: *Regulae in dubio inhaerendum est donec exceptio probetur; Judicandum est semper secundum regulam; Intentionem suam fundatam habet, qui habeat regulam pro se.* In his commentary on Rule 1, Barbosa cites a long list of jurists, canonists and civilists. This wealth of citation is carried over into the discussion of many of the Rules of Law. This is the valuable part of Barbosa's commentary.

e) In the period following the great commentators on the Decretals, Analectus Reiffenstuel's commentary on the Rules of Law is outstanding.[129] In many ways this is the most satisfactory of all commentaries on the Rules of Law. It contains ample and detailed discussion on the Rules of both Pope Gregory IX and Pope Boniface VIII. The source of the separate Rules is carefully indicated. Their application is discussed at length and the exceptions to the Rules are carefully pointed out and explained. No Rule, no matter how slight might be its application,[130] is disregarded. More important Rules are

[127] *Collectanea Doctorum tam Veterum quam Recentiorum in Jus Pontificium Universum* (Lugduni, 1716).

[128] In alternativis debitoris est electio, et sufficit alterum adimpleri.

[129] *Jus Canonicum Universum* (Parisiis, 1870), vol. VII.

[130] E.g., Rule 40: Pluralis locutio duorum numero est contenta.

naturally considered at greater length. In all, the work of Reiffenstuel is most carefully done and, if only one commentary can be made available for study, this one should be used. Reiffenstuel introduces his study of the Rules with sufficient explanation of the concept and construction of a Rule of Law. His divisions are adequate. In short, it would be difficult to find a more readable work on the Rules of Law. Relief alone should be expressed at the lack of abbreviations. Words are printed in full.

f) Vittorio Bartoccetti wrote a short commentary after the promulgation of *The Code of Canon Law* on the Rules of Law.[131] This is a useful commentary especially since it shows where these Rules are cited in the footnotes to the Code. The commentary itself is not extensive and in no way compares with Reiffenstuel. The work, however, must be commended for its introductory pages and for the fine appendices giving details which cost great effort to discover. Canonists are indebted to Bartoccetti's volume even though it will not always serve individual purposes. Some objection can be made to Bartoccetti's criticism of the Rules of Law. This will be stated and discussed in a future article.

g) Francis Reh's study on the introduction to the Rules of Law is almost a necessity.[132] This author has carefully and painstakingly investigated the notion, sources and utility of the Rules of Law. He has really done more than this but this must be mentioned especially. No better bibliography exists today on the Rules of Law. The footnotes to Reh's work are incredibly detailed. They are excellent material for study. The only real criticism that could be made of Reh's work is that not enough application is made to Canon Law. Perhaps the author will find time to continue his studies in this field. If he could do this, the field of Canon Law would be richer for his efforts. The writer, at least, hopes to see more of Reh's excellent work.

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131 *Le Regole Canoniche di Diritto* (Roma, 1939).

132 *The Rules of Law and Canon Law* (Romae, 1939).

THE APPLICATION OF THE PAULINE PRIVILEGE AND THE CONSTITUTIONS OF CANON 1125 IN THE UNITED STATES*

I. The Pauline Privilege

IN this country nearly one half the people, or about seventy millions, are, according to a reliable estimate, affiliated with no religious body. And the other half includes, in addition to those who are of the Jewish faith, a very large number of unbaptized members of the various non-Catholic denominations. It is not an exaggeration to assert that the number of unbaptized in these two groups runs into the millions. Here we have a vast potential harvest of souls, and each year sees more and more of them honestly seeking the truth and finding their way under the influence of grace to the very threshold of the Catholic Church. In some cases, unfortunately, they cannot go beyond the threshold: divorce and consequent re-marriage, so frequent in the United States, often result in situations which constitute an insuperable obstacle to their admission into the true fold. In others, the use of the Pauline Privilege and of the three Constitutions of Canon 1125, if understood in their original meaning and applied according to the original interpretation, is a key that will unlock the door of the true fold to more fortunate individuals.

I think you will agree that I ought at the outset to define, as precisely as possible, the plan and scope of this paper, since the subject is so vast that it cannot be covered *in extenso* within the time allotted. My aim is twofold: 1) to point out certain issues and problems that are likely to be encountered

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in the United States in the application of the Pauline Privilege; 2) to propose interpretations of the Constitutions of canon 1125.

Before proceeding further, it will be helpful to recall the conditions necessary for the valid use of the Pauline Privilege. They may be stated briefly as follows:

1) A valid marriage of two unbaptized persons.
2) The conversion and baptism of one spouse.
3) The physical or moral departure of the unbaptized spouse.
4) The interpellation of the unbaptized spouse to establish the fact of departure.

A. A VALID MARRIAGE OF TWO UNBAPTIZED PERSONS

Before admitting a prospective convert to the instructions preparatory to baptism, or at latest, during the period of instruction, an investigation should be made to determine, if possible, the true nature of the existing union. This step should be taken whether the person is living in wedlock or has obtained his or her civil freedom by divorce.

As the late Pope Pius XI pointed out in his Encyclical, "*Casti connubii*", the attributes of unity and indissolubility are possessed by all true marriages even those contracted and consummated in infidelity, although such unions lack that degree of stability characteristic of the consummated marriages of Christians.[1]

The examination into the marital status of the prospective convert may reveal one of the following situations:

1) It is discovered that a so-called common law marriage exists. In such cases, if the State recognizes common law marriages, the unions are to be regarded as valid. If, on the other hand, such marriages are not recognized by the law, but

[1] "Atque haec inviolabilis firmitas . . ."—Pius XI, litt. encycl. *Casti connubii,* 31 dec. 1930—*Acta Apostolicae Sedis,* XXII (1930), 539 ss., at p. 551 (hereafter cited *AAS*).

are viewed as merely concubinary unions, they are so regarded by the Church.[2]

2) The validity of the marriage contracted by the two unbaptized persons remains doubtful, even after investigation. When such is the case the Ordinary may invoke canon 1127 to resolve the doubt in favor of the Faith and permit the convert to enter a new marriage with a Catholic without the formalities of the Pauline Privilege.

3) The present union of the catechumen is found to be null and void owing to the existence of a previous marriage involving the other spouse and there is no occasion for the use of the Pauline Privilege.

4) It may be discovered that prior to the present marriage of the catechumen, one spouse had previously been married and divorced. Since the impediment of *ligamen* is of the natural law, the second union was invalid. If the first marriage was later dissolved by the death of the other party to it, the second marriage became valid if the consent persevered, because the impediment of *ligamen* having been removed, the naturally valid consent which was formerly given, became effective at the moment the impediment was removed.[3]

5) However, should it be found that the prospective convert has been divorced from his spouse who had been married previously and the impediment of ligamen arising from the first marriage had ceased only after the divorce and complete separation of the parties to the second marriage, the con-

[2] On the right of the State to regulate the marriages of the unbaptized cf. Alford, *Jus Matrimoniale Comparatum* (Romae: Anonima Libraria Cattolica Italiana, 1938), pp. 12-15; De Smet, *De Sponsalibus et Matrimonio* (4. ed., Brugis: Carolus Beyaert, 1927), nn. 433-437; Doheny, *Canonical Procedure in Matrimonial Cases, Formal Judicial Procedure* (Milwaukee: The Bruce Publishing Co., 1938), pp. 434, 435 (hereafter cited *Formal Procedure*); Gasparri, *Tractatus Canonicus de Matrimonio* (ed. nova, 2 vols., Romae: Typis Polyglottis Vaticanis, 1932), I, nn. 240-256 (hereafter cited *De Matrimonio*).

[3] Brennan, *The Simple Convalidation of Marriage*, The Catholic University of America Canon Law Studies, n. 102 (Washington, D. C.: The Catholic University of America, 1937), p. 5.

sent given to the second marriage does not persevere and therefore the marriage is null and void. Consequently, there is no need of recourse to the Pauline Privilege.

To sum up: The first condition for the use of the Pauline Privilege requires that there shall have been a valid marriage contracted when both parties were unbaptized. The existence of a valid marriage should be established by a diligent investigation.

B. THE NON-BAPTISM OF BOTH PARTIES

An investigation must also be made to establish with moral certainty the non-baptism of both parties to the valid marriage. We are all aware that, from their very nature, negative facts are proved only with great difficulty. In an investigation concerned with the question of non-baptism, the responses of the Congregation of the Holy Office in the Savannah case will be found helpful as they refer to circumstances from which the fact of non-baptism may be presumed.[4]

First, some general observations are in order. The prospective convert should be questioned as to the sect to which he belongs. If he was born and reared in a sect which does not observe the rite of baptism and if he has never joined a sect in which baptism is administered, Goodwine [5] holds that sufficient certitude is had that he never was baptized.

Strong presumptions against the fact of baptism exist if the party is the child of parents who belong to a sect which rejects baptism. The same is true in the case of one who is the child of parents who belong to a sect in which baptism is administered only to adults of a certain age and the party has not yet reached the required age. There is likewise strong presump-

[4] S.C.S. Off. (Savannah), 1 aug. 1883—*Codicis Iuris Canonici Fontes*, cura Emi Petri Card. Gasparri editi (9 vols., Romae: Typis Polyglottis Vaticanis, 1923-1939 [Vols. VII-IX, cura Emi Iustiniani Card. Serédi]), n. 1083 (hereafter cited *Fontes*).

[5] Goodwine, *The Reception of Converts*, The Catholic University of America Canon Law Studies, n. 198 (Washington, D. C.: The Catholic University of America Press, 1944), p. 25.

tion against the reception of baptism if the party is the child of parents who are without any church affiliations whatever.[6] In the effort to establish the fact of non-baptism, the testimony of close relatives will also be of value.

And now in an attempt to be somewhat more specific, we shall take up various leads the investigation of which may assist us to determine the non-baptism of a convert who is seeking to use the Pauline Privilege. They may be described as follows:

1) The religious background of the parents, to ascertain the religious sect of each parent and its doctrine on baptism.
2) The religious education of the petitioner. Church or Sunday school records, evidence that he made the Bar Mitzvah, will show whether the petitioner continued in the religion or sect in which he was born.
3) The belief of the parents with regard to infant baptism.
4) On the assumption that it is alleged that the baptism of the petitioner did not take place, an inquiry should be made as to the reason for the omission in this particular case.
5) The practice of the parents in regard to the baptism of the children.
6) The impression of the other spouse (wife or husband) with regard to the baptism of the petitioner.
7) A search for a possible baptismal record in the church or churches with which the petitioner was affiliated.
8) The common reputation as to the religious affiliations of the petitioner; as to church membership; as to membership in religious societies which might, e.g., show him to have been a Jew up to the time of his conversion.

Similar inquiries should be directed to establish the non-baptism of the other party to the marriage. In this effort to arrive at moral certitude, pertinent information on the points

[6] Doheny, *Formal Procedure*, p. 441.

mentioned above should be sought from the parents, brothers and sisters, close relatives and intimate friends of the petitioner and the respondent.

The folowing conclusions are offered partly by way of summation and partly by way of suggestion:

1) The nature of the evidence or proofs required to beget moral certainty of the non-baptism of the two parties is *not* that required for matrimonial trials.[7]
2) Membership in a sect that practices baptism does not of itself warrant the conclusion that a member thereof has actually received baptism. The contrary has been demonstrated many times.
3) Our general disposition and attitude should be one favorable to the convert.
4) In a case where no presumption favors baptism, the rule should be: "A fact is not to be presumed, but must be proved." [8]
5) Those authorized by the Ordinary to make the investigations would do well to check their conclusions with another member of the Curia who is familiar with the procedure. This suggestion is intended merely as an antidote against such as tend to be unduly conservative and also as a check on those—if there are any such—who may tend in the other direction.

C. THE INTERPELLATIONS

Canon 1123 states that, if the Holy See has authorized the omission of the interpellations or if the infidel party has replied to them in the negative, expressly or tacitly, the baptized party has the right to contract a new marriage with a Catholic, unless since his or her baptism the convert has given the non-baptized spouse a just cause for departure.

[7] Cf. canon 1791.

[8] S.C.S. Off., 1 aug. 1883—*Fontes*, n. 1083.

If the converted spouse continues cohabitation with the non-baptized party, the former retains the right to use the Pauline Privilege, even years afterward, should the unbaptized spouse change his or her mind and depart without just cause or cease to cohabit peacefully.[9]

Our problem is this: When a departure of the unbaptized spouse occurs after the baptism of the convert and the former signifies his or her unwillingness to cohabit peacefully with the latter, is it necessary to propose an inquiry as to whether the convert has given just cause for the departure? Or, can we be content with a negative answer to the second interpellation?

On this point, Woeber says: "If the unbeliever answers in the negative to both of the interpellations, an effort must be made to ascertain the motives prompting him to reply thus. The need of this supplementary information cannot be overemphasized, for if the unbeliever has a just cause warranting separation, the Christian may neither licitly nor validly apply the Pauline Privilege. The just cause alleged by the unbeliever, however, must be adjudicated in accordance with the norms of justice and reason."[10] Ramstein states in this connection: "It must be proved . . . that the convert was not the cause of the infidel's departure after his Baptism."[11] Gasparri expresses his opinion thus: "*Tandem si ad primam et alteram interpellationem negative responderit, videndum quanam de causa infidelis discedere velit.*"[12] Among the decrees of the regional synods held in China from 1805 to 1910, a similar view is expressed: "*Ideoque in tali casu* [that is, when there is a negative answer to the second question]

[9] Cf. canon 1124.

[10] Woeber, *The Interpellations,* The Catholic University of America Canon Law Studies, n. 172 (Washington, D. C.: The Catholic University of America Press, 1942), p. 89.

[11] Ramstein, *The Pastor and Marriage Cases* (New York: Benziger Brothers, 1936), p. 189, n. 113.

[12] *De Matrimonio,* II, n. 1152, c.

petendum esset a parte infideli, qua de causa in partem infidelem adverso sit animo." [13]

The contrary view is expressed or implied in the following sources. Father Payen writes: *"Discedit coniux infidelis, qui, non habens aut saltem non opponens discedendi justam causam, eamque a parte iam baptizata sibi datam discedat."* [14] In another passage, the same author having stated that the unbaptized spouse is not considered to have departed if the convert has given just cause for the departure after his baptism, and referring to the response of the unbaptized party, says: *"et interrogatus de duplici aut de una re, hanc justam causam opponit."* [15] In the quotations the author italicizes the words: *"non opponens"* and *"opponit"* as if to suggest that the alleging of the cause for departure must be spontaneous and implying, at least implicitly, that if no cause is alleged for the departure, no query need be made to establish the reason for the same.

In an article published in the *Collectanea Commissionis Synodalis,*[16] a scholarly review published by the Synodal Commission under the sponsorship of the Apostolic Delegate to China, the author expresses the view: *"Sed ex responso S.C.S.O. 19 aprilis 1899 apparet partem infidelem non esse de hac re (num ob iniuriam adulterii sibi allatam discedat) ex vero praecepto interrogandam."* [17]

[13] *Synthesis Decretalium Sinarum,* n. 891.

[14] *De Matrimonio in Missionibus ac Potissimum in Sinis: Tractatus Practicus et Casus* (altera editio, 3 vols., Zi-ka-wei: in Typographia T'ou-se-we, 1935-1936), III, n. 2367; II, n. 2262, p. 582, ad 3 (hereafter cited *De Matrimonio*).

[15] *Op. cit.,* II, n. 2279, IV.

[16] XII (1939), 864.

[17] In the response referred to by the writer (cf. *Fontes,* n. 1220) the Supreme Sacred Congregation of the Holy Office was asked whether crimes committed by the convert after baptism, but which were either ignored by the infidel party or unknown to him, prevent the convert from using the Pauline Privilege. The Supreme Sacred Congregation of the Holy Office referred to a previous decree of August 5, 1759, and to an Instruction of the Sacred Congre-

In the Directorium issued after the Regional Council of Korea held in 1931 with Archbishop Mooney, Apostolic Delegate to Japan and Korea, presiding, there is a formula for making the interpellations.[18] It is in the vernacular, Korean, and the questions asked are the customary inquiries as to whether the unbaptized is willing to be converted, and secondly whether he is willing to cohabit peacefully and to allow the convert to practice her religion and to have the children brought up as Catholics. There is no provision for an inquiry as to the reason, should peaceful cohabitation be denied.[19]

To conclude: Canon 1123 states clearly that the baptized party has the right to contract a new marriage with a Catholic unless since baptism he or she has given the non-baptized person a just cause for departing. It is the universal opinion of writers and commentators that this right is lost if the departure of the infidel party is justified by a cause given by the converted party since baptism. But in the event of a negative answer to the second query of the interpellations, how can the existence of a just cause (at least, in many cases) be established, unless an inquiry be made to ascertain the reason for the negative reply? The response of the Holy Office referred to by the writer in the *Collectanea Commissionis Synodalis* is not pertinent and no conclusive argument can be drawn from the formulae which are rather general and are intended merely as guides to assist the Ordinaries. Even Father Payen is not explicit in his denial of the need of such an inquiry. To preclude, therefore, the possibility of an invalid use of the Pauline Privilege on the part of one, who, by the law of the Church, is not entitled to its use, it is suggested

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gation for the Propagation of the Faith of January 16, 1797, and conceded that the mind of the Congregation was that, in doubts as to the cause of the departure, the judgment was to be rendered in favor of the Faith.

[18] *Directorium Commune Missionum Coreae Jussu Concilii Regionalis 1931 editum* (Hongkong, 1932), n. 540.

[19] In like manner a form given by Konings-Putzer in the *Commentarium in Facultates Apostolicas* (5. ed., New York, 1898), n. 132, proposes merely the usual two questions.

that, in the event of a negative answer to the second question, the Ordinaries or those authorized by them, shall see that an attempt is made to determine the reason for the unbaptized party's unwillingness to cohabit peacefully with the convert; in short whether the infidel party is justified in refusing cohabitation for a cause given by the convert after baptism.

D. THE TIME FOR MAKING THE INTERPELLATIONS

The question has been raised as to whether the requirement of canon 1121, § 1, viz., that the interpellations be made only after the baptism of the convert, is a condition for the validity of the interpellations.

Doheny [20] and Petrovits [21] hold that this circumstance of time is a condition required only for licitness. Gregory,[22] Payen,[23] Vermeersch-Creusen,[24] Vromant,[25] Wernz-Vidal [26] and Woeber [27] are of the opinion that the validity of the interpellations made before the baptism of the convert would not be impaired provided they established that the departure of the unbaptized spouse would persevere after the convert's

[20] *Canonical Procedure in Matrimonial Cases, Informal Procedure* (Milwaukee: The Bruce Publishing Co., 1948), p. 523 (hereafter cited *Informal Procedure*).

[21] *The New Church Law on Matrimony* (2. ed., Philadelphia: McVey, 1926), n. 563, p. 431.

[22] *The Pauline Privilege,* The Catholic University of America Canon Law Studies, n. 68 (Washington, D. C.: The Catholic University of America, 1931), p. 72.

[23] *De Matrimonio,* II, n. 2342.

[24] *Epitome Iuris Canonici,* II (6. ed., Mechliniae, Romae: H. Dessain, 1940), n. 431 (hereafter cited *Epitome*).

[25] *Ius Missionariorum,* Tom. V, *De Matrimonio* (Lovanii: Museum Lessianum, 1931), n. 323 (hereafter cited *De Matrimonio;* this edition will be cited throughout).

[26] *Ius Canonicum ad Codicis Normam Exactum,* 7 vols. in 8, Vol. V, *Ius Matrimoniale* (3. ed., a P. Aguirre, Romae: Apud Aedes Universitatis Gregorianae, 1946), n. 632.

[27] *The Interpellations,* pp. 68 ss.

baptism. Nau, however, says: "For the validity the interpellations must be made after the baptism of the convert." [28]

The response of the Holy Office [29] to the effect that the parties were not to be disturbed in cases where the interpellations had been anticipated, is alleged by the authors who regard the element of time merely as a condition required for the lawful making of the interpellations. It is not at all likely that the response of the Holy Office would have been given had the marriages been null and void *ab initio*. Nor does the law contained in the Code carry any sanction of nullity either express or equivalent. In conclusion, the milder opinion, that which holds that it would be illicit but not invalid to make the interpellations before the baptism of the catechumen, is deemed preferable.

E. THE NECESSITY OF ESTABLISHING THE FREE STATE

Inasmuch as the Pauline Privilege does not carry with it any power to dispense from matrimonial impediments the freedom of the convert to marry as well as that of his prospective spouse should be established according to the 1941 Instruction of the Congregation of the Sacraments.[30] An impediment which may be easily overlooked, is that of *crimen* particularly as it arises from adultery and mutual promise to marry or from adultery and attempt at marriage. It may happen that prior to his conversion, a divorced unbaptized non-Catholic had been keeping company with a Catholic and that both acts required for incurring the impediment: 1) the adultery and the mutual promise or, 2) the adultery and attempted marriage, took place. Even though one accomplice is baptized and the other unbaptized, the impediment of

[28] *Manual on the Marriage Laws of the Code of Canon Law* (New York: Pustet, 1933), p. 179 (hereafter cited *Marriage Laws of the Code*).

[29] S.C.S. Off., 3 iun. 1874—*Fontes*, n. 1030.

[30] S.C. de Sacramentis, instr. 29 iun. 1941—*AAS*, XXXIII (1941), 297; Bouscaren, *The Canon Law Digest*, II (Milwaukee: The Bruce Publishing Co., 1943), 253.

crime is incurred. It affects the baptized party directly, the unbaptized party only indirectly.[31]

F. THE VINDICTIVE PENALTY OF *infamia iuris*

In the supposition that the prospective convert is a divorced non-Catholic who has already attempted marriage with a Catholic with whom he later intends to contract validly by the use of the Pauline Privilege, there is another circumstance that merits attention.

One who is aware of the bond of marriage which binds either himself or his accomplice and attempts marriage even by a civil ceremony, commits the ecclesiastical crime of bigamy and contracts legal infamy.[32] The effects of this vindictive penalty are enumerated in canon 2294, § 1.

Infamy of the law ceases only by dispensation of the Holy See.[33] In occult cases however, the Ordinary is empowered to remit *latae sententiae* vindictive penalties under the conditions of canon 2237, § 2.

G. MARRIAGE WITH A CATHOLIC

When all the conditions required by law have been fulfilled, the convert may contract a new marriage with a Catholic.[34] It may happen that a convert wishes to invoke the Pauline Privilege but in order to rectify an attempted marriage and to legitimize a child already conceived, desires to marry a non-Catholic. What are the prospects of obtaining a dispensation from the impediment of mixed religion or of disparity of worship in conjunction with the Pauline Privilege?

[31] Cf. canon 1036, § 3, and Gasparri, *De Matrimonio,* I, n. 681.

[32] Cf. canon 2356 and Vermeersch-Creusen, *Epitome,* III (6. ed., 1946), n. 558.

[33] Cf. canon 1123.

[34] S.C.S. Off., 17 iul. 1850—*Fontes,* n. 911; S.C.S. Off., 29 aug. 1866—*Collectanea Sacrae Congregationis de Propaganda Fide* (2 vols., Romae, 1907), n. 1297 (hereafter cited *Coll. S.C.P.F.*); S.C.S. Off., 22 nov. 1871—*Fontes,* n. 1019.

The local Ordinary may not use his Quinquennial Faculties to dispense.[35] However, it is the opinion of the writer that such a dispensation can be obtained especially if there is hope of the non-Catholic's conversion. Some years ago in Rome we prepared on behalf of one of our mission Ordinaries a petition for a faculty similar to that given by Father Vermeersch in *Periodica,* XIV (1925), 114. The petition was presented to the Sacred Congregation for the Propagation of the Faith and referred by that Sacred Congregation to the Supreme Sacred Congregation of the Holy Office. The request was granted.

II. The Constitutions of Canon 1125

The initial question to be resolved concerns the meaning of the words of canon 1125: "*ad alias quoque regiones in eisdem adiunctis extenduntur*". The serious implications which hang upon the resolution of this question may be grasped by a reference to some correspondence which recently passed through my hands. A group of bishops whose dioceses cover a large section of this country, having found marital difficulties among the chief obstacles to conversions, have had the matter under study for some three years. The precise difficulty is expressed by one of their number who writes: "Can we safely follow the interpretation that these words [*in eisdem adiunctis*] refer to individual cases as would seem to be the more probable opinion and not to regions as Augustine and Ayrinhac would indicate?"

From the letter is would appear that the bishops found a ready solution for at least some of their difficulties in the use of the Constitutions of canon 1125. However, out of deference to the authors mentioned, there was a hesitancy to apply the benign provisions of the Constitutions in practice.

Since the promulgation of *The Code of Canon Law,* there has been a divergence of opinion among canonists as to the meaning of the phrase quoted from canon 1125. In this

[35] Cf. documents cited in preceding footnote.

country, Ayrinhac,[36] Augustine,[37] Gregory [38] and Woywod [39] espoused the opinion that it refers to countries or regions. Such a view would exclude the application of the Constitutions in the United States, or certainly greatly restrict it.

Another opinion holds that the words "*in eisdem adiunctis*" apply to individual cases rather than to countries or regions. According to this view, the Constitutions are applicable in this country, or in any country for that matter, to individual cases in which the circumstances are the same as those for which the Constitutions were originally intended. It is to be understood that all the conditions characteristic of the 16th century need not be verified literally; the main causes, however, should be the same. Express mention of the applicability of the Constitutions to the United States is made by the following American canonists: Bouscaren,[40] Burton,[41] Doheny,[42] Nau,[43] Woeber [44] and Woods.[45]

The authors quoted on behalf of the restrictive interpretation of the phrase have all passed to their eternal reward, a fact which precludes any possibility of a change of opinion in their texts—at least by themselves. Moreover, the views expressed by them appeared not too long after the Code had

[36] "Indissolubleness of Non-Catholic Marriages"—*Ecclesiastical Review*, LXXII (1925), 408.

[37] *A Commentary on the New Code of Canon Law*, 8 vols., Vol. V (2. ed., St. Louis: B. Herder Book Co., 1920), 364.

[38] *The Pauline Privilege*, p. 87.

[39] *A Practical Commentary on the Code of Canon Law* (10th printing, 2 vols., New York: Joseph Wagner Co., Inc., 1946), I, n. 1156.

[40] "An Inquiry into the Practical Application of Canon 1125 Outside Mission Countries"—*Analecta Gregoriana*, IX, 279.

[41] *A Commentary on Canon 1125*, The Catholic University of America Canon Law Studies, n. 121 (Washington, D. C.: The Catholic University of America Press, 1940), p. 181.

[42] *Informal Procedure*, pp. 550, 552, 554, 559.

[43] *Marriage Laws of the Code*, p. 184, n. 146.

[44] *The Interpellations*, p. 137.

[45] *The Constitutions of Canon 1125* (Milwaukee: The Bruce Publishing Co., 1935), pp. 73-82.

come into force and at a time when little attention had been focussed upon canon 1125 and the Constitutions.

A new period of modern missionary effort, initiated during the pontificate of Benedict XV and continued and expanded under his successors, has brought to the fore many and varied mission problems. Incidental to the solution of some of these problems, studies have been made on the Mission Faculties and on the Constitutions. A new interest has been awakened not only in the true and original meaning and interpretation of the Constitutions, but also in their use and application to strictly non-missionary countries. Today the opinion which holds that the words, "*in eisdem adiunctis*", refer to individual cases has received wide acceptance, nor is there any need, as proposed in the correspondence referred to above, to seek a decision from the Holy See on the matter. In effect, the accepted opinion would make the Constitutions applicable in the United States to any case in which the required conditions were verified.

A doubt has, indeed, been raised as to whether the concessions made in the Constitutions of canon 1125 can be applied without consulting the Holy See, that is, merely by force of the common law.[46] On this point, Gregory points out that, inasmuch as the favors contained in the Constitutions arise from the law itself, they may be employed without the necessity of any further recourse to Rome.[47] This view is supported by the fact that the first two Constitutions, *Altitudo*, of Paul III, and *Romani Pontificis*, of Pius V, grant their favors directly to the polygamous convert. Further support may be derived from the change in the new formulas of faculties issued by the Sacred Congregation for the Propagation of the Faith which omit Faculty XXIV of the previous *Formula Tertia* and now simply refer the Ordinaries to canon 1125. The view that recourse to the Holy See is necessary for the

[46] Ayrinhac-Lydon, *Marriage Legislation in the New Code of Canon Law* (new revised edition, New York: Benziger Brothers, 1946), p. 321.

[47] *The Pauline Privilege*, p. 84.

use of the Constitutions of canon 1125, while advanced dubiously and apparently with some misgivings by the author just mentioned, is not commonly held by writers and commentators. Because even a shadow of a doubt is sufficient to beget in the minds of some, a hesitancy and a reluctance to act, there is sufficient cause for introducing the matter into our discussion.

It was my original purpose to preface a discussion of the interpretation of the Constitutions by an historical survey of theological opinion on the papal power to dissolve marriages for the sole purpose of demonstrating its effect upon the interpretation of the Constitutions, notably the first two, from the 16th century to the present day. Such a digression could be made only at the sacrifice of more useful and practical discussion. However, a few observations in the form of conclusions may serve as an introduction to the study of the interpretation of the Constitutions.

1. The failure of theologians and canonists to recognize any power in the Church to dissolve the marriages of the unbaptized, other than that contained in the Pauline Privilege, was responsible for an effort to make the Constitutions conform to the conditions required for the Pauline Privilege.

2. Any attempt to arrive at the true meaning of the Constitutions by a study of the responses of the Sacred Congregations will convince one that Burton's observation to the effect that the full force of the Constitutions is not to be determined from these replies, is indeed an understatement.[48] Some of the responses actually show confusion as to the Constitutions themselves, e.g., those of the Supreme Sacred Congregation of the Holy Office under date of July 4, 1855[49] and November 22, 1871.[50]

[48] *A Commentary on Canon 1125*, p. 129.

[49] *Fontes*, n. 931.

[50] *Fontes*, n. 1019.

3. Authors are agreed that the concessions of the Constitutions are applicable not only to men converts who have lived in polygamy, but also to women converts who have had several husbands.

4. Differences of interpretation today, are confined almost entirely to the Constitution, *Romani Pontificis,* of Pius V.

A. THE CONSTITUTION, *Altitudo,* OF PAUL III

The Constitution, *Altitudo,* issued on June 1, 1537, was addressed to the bishops of the new territories then being evangelized by the Spanish. Roughly speaking, one may say that they comprised what is now Mexico, Central and South America, Puerto Rico, Cuba, Haiti and the Philippines.

The essential condition for the use of the concessions granted by the Constitution, is that the convert from polygamy cannot remember which of his consorts was his first wife.

In summary fashion it may be said of the provisions of the Constitution:

1) The Constitution is concerned with a convert from infidelity who before his conversion had several wives, simultaneously or successively, and who now cannot remember which of his partners he first took to wife.

2) The Constitution may also be used on behalf of a woman convert who has lived with several husbands.

3) The convert is permitted to marry anyone of the partners with whom he (she) is now living, or anyone of those whom he (she) has dismissed.

4) The desire to receive baptism, or even the actual baptism of anyone of the uncertain spouses, in nowise affects the use of the privilege.

5) No interpellations are required nor is any dispensation from them necessary.

6) If the partner chosen is related to the other in the third degree of collateral consanguinity, no dispensation is necessary as it is implicitly contained in the Constitution.

7) Matrimonial consent should be given *ad cautelam.*

8) If the consort whom the convert wishes to keep is not baptized, no dispensation from the impediment of disparity of worship is necessary. On this point in the interpretation of the Constitution, canonists have differed. Payen,[51] Vromant,[52] Woods [53] and De Smet [54] hold that such a dispensation is necessary. In reply to a question proposed by the First Council of Indo-China, the Supreme Sacred Congregation of the Holy Office, June 30, 1937, stated that no dispensation is required in the use of the Constitution, *Altitudo,* as it is implicitly contained therein. However, the requirements of divine law referred to in the guarantees of canons 1061 and 1071 must be imposed before the baptism of the convert.[55]

Because the essential condition, namely, that the convert cannot recall the identity of the spouse with whom he first contracted a valid marriage, will seldom be verified in the United States, it is not likely that the Constitution, *Altitudo,* will be of much practical use here.

B. THE CONSTITUTION, *Romani Pontificis,* OF PIUS V

This Constitution likewise applies to polygamist converts. The Holy See had been informed that the Indians practiced polygamy and often repudiated their wives even for trifling reasons. The missioners had followed a practice of permitting a convert to remain with the wife who was baptized with him. Since it very frequently happened that the wife thus retained was not the first and true spouse, both bishops and priests were very much concerned lest the marriages thus contracted were not valid. Because it would be a very great hardship to separate the convert from the wife with whom he received

51 *De Matrimonio,* II, n. 2405, bis.

52 *De Matrimonio,* n. 357.

53 *The Constitutions of Canon 1125,* p. 44.

54 *De Sponsalibus et Matrimonio,* n. 353, p. 300, nota 2.

55 *Acta Primi Concilii Indosinensis, Hanoi 1938,* pp. 176, 177; quoted in Bouscaren, *The Canon Law Digest,* Supplement through 1948.

baptism, especially because it would be difficult to find the true wife, the Sovereign Pontiff in the Constitution, *Romani Pontificis,* decreed that such marriages as had been contracted in the past were lawful and that such marriages when permitted in the future would be lawful.

Authors are agreed that the Constitution, *Romani Pontificis,* like the Constitution, *Altitudo,* may be used also on behalf of a woman convert from polyandry, whether the latter is successive or simultaneous.

We shall begin the discussion of the Constitution, *Romani Pontificis,* by giving various interpretations, the first of which posits as a requisite for its use that the lawful spouse cannot be found. In the Constitution itself there is no such limitation or restriction confining its use to those cases only in which the first wife (husband) cannot be found.[56]

The second interpretation maintains that the Constitution grants a dispensation from the second interpellation. In the event of a negative answer to the first question, the convert may proceed to contract a valid marriage with the party chosen if she is baptized with him or is already a Catholic.[57]

The third and, today, the more common interpretation holds that the Constitution *ipso iure* grants a dispensation from both interpellations and permits the convert from polygamy to marry his present partner if she is willing to be baptized with him. There is, however, this restriction recognized in this view, namely, that the first and true spouse does not express her desire to receive baptism. This is the opinion accepted by Burton,[58] Payen,[59] Vromant,[60] and Woods.[61]

[56] De Smet, *op. cit.,* p. 301, nota 2; Vromant, *De Matrimonio,* n. 359; in the second edition Vromant changed his opinion.

[57] As in Faculty XXIV in *Formula Tertia* of the former Faculties of the Sacred Congregation for the Propagation of the Faith.

[58] *Loc. cit.*

[59] *Ibid.,* II, n. 2407.

[60] *Op. cit.,* (2. ed.), n. 344, nota 3.

[61] *Op. cit.,* pp. 54, 55.

The fourth opinion is like the third in that it holds that no interpellations are necessary but it goes a step further as it permits marriage with one of the consorts even if the first or legitimate spouse has expressed a desire to be baptized.[62]

Recent commentators are agreed that the basic conditions required for the favors granted by Pope Pius V in his Constitution, *Romani Pontificis,* are these two:

1) That it would be a very great hardship for the polygamist to be separated from the wife with whom he is living.[63]
2) That his wife is prepared to receive baptism with her husband.

Canonists in the past have laid emphasis on the inability to find the first wife, and have made this the main, if not the exclusive cause for the use of the Constitution. While the difficulty of finding the first wife may call for special consideration as one of the reasons for the hardship, this very contingency is provided for by the other two Constitutions of canon 1125. If it is very difficult to find the first wife because no one knows which was the first lawful spouse, the Constitution, *Altitudo,* of Paul III, is to be used, as we have already explained. But if it is very difficult or impossible to locate the first wife, then recourse should be had to the privilege granted in the Constitution, *Populis,* of Gregory XIII.

The conclusion is this: the clause "*maxime quia difficillimum foret primam coniugem reperire*" does not constitute an essential and exclusive condition for the use of the privilege granted by Pius V. This interpretation is borne out by the response to the *Votum* presented to the Sacred Congregation for the Propagation of the Faith by the Fathers of the First Plenary Council of China.[64]

62 Rayanna, "De Constitutione S. Pii Papae V, *Romani Pontificis*"—*Periodica,* XXVIII (1939), 205; Tyukody, *Collectanea Commissionis Synodalis,* XII (1939), 1073, 1075.

63 Burton, *op. cit.,* p. 155; Rayanna, *ibid.,* p. 202.

64 *Acta, Decreta et Normae—Vota—Primum Concilium Sinense* (Shanghai: Typographia Missionis Catholicae, 1929), Votum XII.

The Fathers of the First Plenary Council of China faced precisely the same situation that confronted the missioners of the Indies some three hundred and fifty years earlier. In the Constitution, *Romani Pontificis,* the Fathers of the Council thought they saw the solution of their difficulty. The words of the Constitution appeared clear and unequivocal; yet if those words were to be accepted in their literal sense, the interpretation would run counter to the traditional and almost universally accepted one. In their perplexity, they turned with filial confidence to the Holy See.

The following is a translation of the *Votum:*

"The Mission Ordinaries of China have the faculty of dispensing gentiles and infidels having several wives so that, after conversion and baptism, a convert may retain any consort whom he wishes, provided she is willing to be baptized and unless the first and lawful spouse wishes to be converted.

"On the other hand, in the Constitution, *Romani Pontificis,* of Pius V, it is unconditionally stated that, in a case of successive polygamy, the neophyte may retain as his lawful spouse the consort who is willing to be baptized with him, without any question of interpellations whatever.

"The First Chinese Council is aware how frequently there arise cases of those who seek Baptism together with one of their wives who is a second or even third successive spouse and who consents to baptism. It would be very hard, if not impossible, to dissolve such unions. The Council humbly asks the Holy See whether, according to the tenor of the Constitution, *Romani Pontificis,* it is lawful for Vicars and Prefects to baptize these catechumens together with their wives who consent to baptism; granting the converts, moreover, permission to remain in the existing union as a lawful one, absolutely and without any interpellation of the first wife."

The Sacred Congregation of Propaganda replied in the affirmative.

In order that both the *Postulatum* and the response may be more fully understood, a further word of explanation will be helpful. The problem that vexed the Fathers of the First Chinese Council was none other than the special difficulty to be found in the marriages of polygamists in which the separation of a prospective convert from the wife with whom he is cohabiting and with whom he seeks baptism would be very hard and almost impossible.

Let us bear in mind that, in the situation under consideration, there is no question of the first wife being unknown or of any difficulty of finding or interpellating her. Nor, indeed, is it implied that she has departed or does not wish to be converted and baptized. This is certain because the Mission Ordinaries already possessed faculties to dispense in such cases by virtue of the Apostolic Faculties of *Formula Tertia Maior* or *Minor,* numbers XXIV, XXV, XXVI. Rather, the problem concerned a first wife whose whereabouts were known and who was even willing to be converted.

Having alleged the inefficacy of recourse to Faculty XXIV of *Formula Tertia* to meet this contingency, the Fathers of the Council turned to the Constitution, *Romani Pontificis,* of Pius V. In their opinion, this Constitution seemed to allow them to baptize the convert together with the woman with whom he is living, without making any interpellations. The Council, therefore, presented the *Votum* as reported above, and received an affirmative answer.

The response should not be construed as an extensive interpretation of the former Faculty XXIV, or as a dispensation from both interpellations as Father Vromant contends,[65] because the Fathers of the Chinese Council did not ask for these. The response does not grant a new faculty, nor is it an authentic though perhaps extensive interpretation of the Constitution, as Father Payen believes.[66] The duty of authentically interpreting the laws of the Code belongs exclusively

[65] *De Matrimonio,* n. 370.

[66] *Loc. cit.*

to the Commission appointed for that purpose. There is question here merely of an interpretation of the words of the Constitution; words which in themselves are clear and unequivocal.[67]

Furthermore the Constitution, *Romani Pontificis,* is founded not upon the Pauline Privilege, but on the plenitude of the apostolic power which the Holy Father possesses as the successor of Saint Peter. Therefore the rules and conditions required for the proper application of the Pauline Privilege should not be applied in the use of the Constitution, *Romani Pontificis. "Lex per se non est extendenda ob similitudinem aut identitatem rationis. Nam in iis quae pendent a libera voluntate legislatoris, non concluditur a pari aut a maiori ad minus."* [68]

The reason for the favor granted by the Constitution, *Romani Pontificis,* is that there would be very great hardship or difficulty caused by the separation of the convert from the woman who will be baptized with him (*"quia durissimum esset separare eos ab uxoribus cum quibus ipsi Indi baptismum susceperunt"*).

The suppression of the former Faculty XXIV in the 1941 Formulas of Faculties issued by the Sacred Congregation for the Propagation of the Faith would seem to avoid the restrictive clause, *"nisi prima voluerit converti"*, of the suppressed faculty as if to suggest that it was the mind of the Holy See to have the Constitution understood and interpreted as it was originally and as it was more recently by Votum XII of the Chinese Council.

Burton [69] inclines to the conservative and more common

[67] For a complete study of Votum XII, consult Tyukody, "Verus Sensus atque Recta Applicatio Voti XII Primi Concilii Sinensis"—*Collectanea Commissionis Synodalis,* XII (1939), 845-869; Rayanna, *ibid.,* pp. 48 ss.

[68] Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici,* Vol. I, Tom. II, *De Legibus Ecclesiasticis* (Mechliniae-Romae: H. Dessain, 1930) n. 263.

[69] *A Commentary on Canon 1125,* pp. 158 ss.

opinion. He holds that a probable restriction exists when the first wife expresses a desire to be baptized. Cappello,[70] Rayanna[71] and Tyukody[72] espouse the view that the Constitution may be used even if the true spouse asks for baptism. Doheny[73] regards their opinion as logically and juridically tenable.

On this disputed point, it may be observed: 1) there is no such restriction stated in the Constitution; 2) actually the restriction had its origin in the attempts of canonists and theologians to confine the interpretation of the Constitution within the limits of the Pauline Privilege, attempts that resulted from the prevalent erroneous conceptions of the papal power over the bond of a *matrimonium legitimum;* 3) the reason for the privilege does not cease to be verified even if the true spouse asks for baptism.

By way of summation, we may say that the Constitution, *Romani Pontificis,* applies to a polygamist convert whose first wife is known certainly. If it would cause a very great hardship to separate the convert from one of his pseudo-wives with whom he has lived and who will be baptized with him, no interpellation of the first wife need be made.

The great hardship of separation may arise from many and varied causes. By way of illustration one thinks of the following:

1) Mutually strong love and devotion exist between the man and wife.
2) The convert detests his former wife and would not resume cohabitation with her.
3) Children have been born of the present union and deserve consideration.

[70] *Tractatus Canonico-Moralis de Sacramentis,* Vol. V, *De Matrimonio,* (5. ed., Romae: Domus Editorialis Marietti, 1947), n. 787, n. 5 (hereafter cited *De Matrimonio*).

[71] *Ibid.,* pp. 51, 52.

[72] *Collectanea Commissionis Synodalis,* XII (1939), 1073.

[73] *Informal Procedure,* p. 556.

4) The present spouse has enhanced her husband's social and political prominence.
5) The parties have lived in wedlock for many years and their children are all of adult age.

Mention must be made, also, of the reason given in the Constitution itself; namely the near-impossibility of finding the first wife.

In applying the privilege of this Constitution, the procedure to be followed by the Ordinary or his delegate is similar to that outlined above for the Pauline Privilege. In a summary and extrajudicial hearing, evidence should be obtained to establish: a) the fact of a valid marriage contracted when both parties were unbaptized; b) the subsequent baptism of the one seeking the privilege and the baptism of the spouse from whom he cannot easily separate; c) the existence of the cause for the use of the Constitution. The records of this investigation should be filed in the archives.[74]

The baptism of the other spouse must precede the new marriage of the convert, but it is not necessary that the two baptisms take place on the very same day. However, after his baptism, the convert from polygamy may not resume marital relations with the other party until the marriage has been duly regularized and blessed by the Church.

While it is true that the Constitution itself makes no mention of any renewal of consent, authors generally require that matrimonial consent be exchanged between the baptized parties according to the form prescribed by law.[75] In many cases involving the use of the Constitution, *Romani Pontificis*, it will be found possible to make the declarations authorizing the omission of the interpellations, baptize the parties and receive the renewal of consent all on one and the same day.

[74] Doheny, *ibid.*, p. 555, footnote 20.

[75] Requiring consent: Burton (*op. cit.*, p. 163), Tyukody (*ibid.*, p. 1069), Vromant, "De Dispensatione ab Interpellationibus in Ordine ad Privilegium Fidei—Applicationes Practicae Canonis 1125"—*Periodica*, XX (1931), p. 114*.

Not requiring consent: Augustine, *A Commentary on the New Code of Canon Law*, V, 363; Woeber, *The Interpellations*, p. 125.

The frequency of divorce in the United States has created a situation among many unbaptized Americans, which is nothing more than a state of successive polygamy. Whenever it would cause a great hardship to separate a prospective convert who has had a plurality of wives from the wife with whom he is now living (or has lived) and this wife is prepared to receive baptism with him, it is my contention that such a one may be accorded the privilege of the Constitution, *Romani Pontificis,* even though the first wife is willing to receive baptism. As we have repeatedly stated, the Constitution applies also to a woman convert who has had several husbands.

C. THE CONSTITUTION, *Populis,* OF GREGORY XIII

The Constitution, *Populis,* of Gregory XIII, issued on January 25, 1585, was occasioned by the inhuman treatment visited upon the unfortunate victims of the then flourishing slave trade. The negro tribes of the west coast of Africa were raided and hunted down and the captives shipped to the New World in the pest-ridden slave ships of the Portuguese and the English. Other slaves were transported to the Mohammedan regions of North Africa or to Ethiopia. No regard was paid to family ties and husbands and wives were often hopelessly separated. When one or the other party to a marriage was converted, the missionaries faced the difficulty, in fact the impossibility, of making the interpellations. Frequently it was not known, indeed it was often impossible to determine, where the other party was living. Sometimes communication between the regions was not possible because of the enmity and ill will of the inhabitants. At other times great distance alone was an insuperable obstacle.

Unlike the Constitutions of Paul III and Pius V, the concessions granted in the Constitution, *Populis,* of Gregory XIII, apply not to polygamists only but to any convert from infidelity. In still another respect, the Constitution of Gregory XIII differs from the two preceding Constitutions, in that

it does not *ipso iure* dispense from—or, as others phrase it, permit the omission of—the interpellations. It gives that power to certain ecclesiastical persons.

Two faculties are granted by the Constitution:

1) The faculty to dispense from the interpellations when it is impossible to make them.

2) The faculty to dispense from the interpellations if the absent infidel spouse has failed to manifest his or her intention within the time specified.

The Constitution requires that it be ascertained, at least by a summary extrajudicial process, that the absent consort could not be reached, or that he or she failed to intimate his or her intention within the specified time. This process must be described in a written document setting forth briefly the reasons for dispensing from the interpellations.

The Constitution states that the marriage contracted after the baptism of the convert will be valid, even if evidence discovered later should prove that the absent spouse was prevented from answering the interpellations or was already baptized at the time the second marriage took place. This last clause implies that not only is a dispensation from the interpellations granted by the Constitution, but also that, in the situation described, there is a dissolution of a marriage that has become ratified by the baptism of both parties.

To return to the faculties granted by the Constitution, it might be asked what reasons are considered sufficient for the correct use of the first faculty granted by the Constitution, *Populis,* i.e. the faculty to dispense in cases when it is impossible to make the interpellations. The following reasons are considered sufficient to authorize the omission of the interpellations; or in other words, dispense from them:

1) Ignorance of the whereabouts of the other party.[76]

[76] S.C.S. Off., 3 iun. 1874—*Fontes,* n. 1030; *Coll. S.C.P.F.,* n. 1415.

2) Distance so great as to constitute a serious difficulty.[77]
3) Ignorance of the converted spouse as to which infidel consort was the first and lawful spouse.[78]
4) Uncertainty of the convert as to whether he ever gave a true matrimonial consent to any of the women with whom he had cohabited.[79]
5) Impossibility of communication with a barbarous and warlike people among whom the infidel spouse is living.[80]

It may not be amiss to call attention to the fact that the reasons just alleged do not cover all cases possible under the Constitution. What is really important—indeed, all that is necessary—is that it be found impossible to make the interpellations and that the impossibility be established by an investigation, at least summary and extrajudicial.

It is the more common opinion of authors that the Constitution, *Populis,* also admits of a dispensation from the interpellations on the grounds of their moral impossibility.[81]

There is question whether the circumstances that make the interpellations useless, are sufficient to authorize their omission by virtue of the Constitution. Whether or not one may prefer to place the following reason under the category of moral impossibility, it seems futile to interpellate when the infidel party has become permanently insane.[82]

[77] Benedict XIV, *In suprema,* 16 ian. 1745—*Fontes,* n. 353; *Coll. S.C.P.F.,* n. 2252; S.C.S. Off., 11 iun. 1760—*Fontes,* n. 881; S.C.S. Off., 29 nov. 1882—*Fontes,* n. 1075; Synodus Sutchuensis, 2 sept. 1803, cap. IX, n. 8—*Coll. S.C.P.F.,* II, 481.

[78] Paul III, const. *Altitudo;* S.C.S. Off., 18 maii 1892—*Fontes,* n. 1155.

[79] S.C.S. Off., 8 iun. 1836—*Fontes,* n. 874.

[80] Synodus Sutchuensis, *loc. cit.;* S.C.S. Off., 29 nov. 1882—*Fontes,* n. 1075.

[81] Payen, *De Matrimonio,* II, n. 2409; Cappello, *De Matrimonio,* n. 787; Bouscaren, "An Inquiry into the Practical Application of Canon 1125 Outside Mission Countries"—*Analecta Gregoriana,* IX, 294; Vromant, *De Matrimonio,* n. 364.

[82] S.C. de Prop. Fide, 5 mart. 1787—*Fontes,* n. 4615.

Another example given by Bouscaren is the case of a divorced infidel who has subsequently remarried and has completely broken with the spouse of the first marriage who has since been converted.[83] The response of the Supreme Sacred Congregation of the Holy Office, June 18, 1884 [84] (the Portland decision), which does not admit of divorce as a cause for the complete omission of the interpellations, has sometimes been misunderstood and interpreted to mean that divorce is never a cause to justify the canonical omission of—i.e., dispensation from—the interpellations. However, by way of conclusion on the point under consideration, it is the more common opinion that while both a physical and a moral impossibility of making the interpellations are sufficient for granting a dispensation by virtue of the Constitution, *Populis*, their evident inutility *alone* is not sufficient.[85]

A second faculty granted by the Constitution is that of dispensing from the interpellations when it has been ascertained that the absent consort failed to manifest her intention within the specified time. In view of canon 1123, § 1, this provision of the Constitution is merely a declaration that failure to reply within the specified time will be taken as a negative answer.[86] A month is mentioned by many authors as a suitable length of time. In this matter, the Ordinary and those authorized to act, should be guided by circumstances of time and place. However, in keeping with the provisions of canon 1122, § 1, the infidel party should be informed that failure to reply within the given time will be construed as a negative answer.

As previously stated, the Constitution grants the power to authorize the omission of the interpellations to Ordinaries of

[83] S.C.S. Off., 18 iun. 1884—*Fontes*, n. 1088; S.C.S. Off., 4 febr. 1891—*Fontes*, n. 1130; Bouscaren, *loc. cit.*

[84] *Fontes*, n. 1088.

[85] Bouscaren-Ellis, *Canon Law, A Text and Commentary* (Milwaukee: The Bruce Publishing Co., 1946), p. 558.

[86] Cf. canon 1122, § 1. Cf. Vromant, *De Matrimonio*, n. 363.

places; to pastors and all those who, according to canon 451, § 2, are declared equivalent to pastors; to approved confessors of the Society of Jesus and to such confessors of other Orders as may enjoy the faculties by communication.

The power granted to local Ordinaries and pastors by the Constitution is attached to their office and is therefore ordinary. As such it may be exercised according to the norms of canons 201 and 202, § 1. Those possessing the faculty by ordinary power may delegate it for individual cases or in general. In the latter instance, since the delegation is *ad universitatem negotiorum* the one delegated may subdelegate.

A quotation from Woeber's dissertation sums up the matter nicely: "In regard to dispensations granted by the Constitution of Gregory XIII, '*Populis*', it appears to the writer that Ordinaries of the United States are either unaware of their power or are loath to use the extraordinary faculty to dispense given them in the common law by reason of canon 1125." [87]

These sentiments apply also with reference to the concessions contained in the Constitution, *Romani Pontificis,* wherein may be found the solution to many of the cases that occur here in the United States with regard to the admission into the true fold of those who have had a plurality of marriages.

[87] *The Interpellations,* p. 137.

Domestic obligations may not be made the subject of commerce. A wife may not, therefore, recover the value of services required of her by her status, even on an express promise of her huband to pay or to devise to her the family home—*Ritchie* v. *White,* 35 S.E. (2d) 414 (North Carolina, 1945).

THE MOTU PROPRIO *CREBRAE ALLATAE**

IN a motu proprio dated February 22, 1949, His Holiness Pope Pius XII published and promulgated a Code of laws which as of May 2, 1949, became the sole law governing marriages of Catholics of the various Eastern rites.[1] Though the bulk of the legislation represents a modern version of the ancient juridical traditions and customs of the Near East, in some instances circumstances necessitated certain changes, one might say radical changes, which did not meet with the wholehearted approval of the interested parties. Thus, for instance, the provisions requiring that marriages take place in the church of the groom were not favorably received by those who for years have been governed by the provisions of the decree *Ne temere.* It was natural then for these parties to question the extent to which the new Code would affect existing particular law. In Ruthenian circles, for instance, the question was asked whether or not the matrimonial provisions of the decree *Cum data fuerit* could continue to operate notwithstanding the sweeping abrogative clause of the motu proprio *Crebrae allatae.*

With all due respect to those who think otherwise I believe it can be accepted as an indubitable juridical fact that the sole law governing marriages of Eastern rite Catholics is the one published and promulgated in the motu proprio *Crebrae allatae,* and hence all other canonical provisions on marriage, including those of the decree *Cum data fuerit* are wholly ineffective as of May 2, 1949, except for those instances in which the new law allows for some practice based on legitimate custom or an existing particular law.

* Paper read by Rev. Stephen C. Gulovich, S.T.D., Ph.D., at the meeting of The Canon Law Society of America, in Cleveland, December 28, 1949.

[1] *Acta Apostolicae Sedis,* vol. XLI (1949), n. 3.

In motivating the promulgation of the new law the Holy Father made it clear that Prelates of the various Eastern rites repeatedly urged the Holy See to take steps to remove the uncertainties and divergent practices in the Eastern Churches created by the multiplicity, obscurity or total lack of provisions with regard to matrimony, and to bring some sort of unity which would not interfere with the legitimate diversity of the various rites. To this end, the Holy Father assures us, much time and effort were spent in the study of the canonical traditions of the East, tentative drafts of proposed new legislation were submitted to the scrutiny of the interested Prelates who in this manner were given an opportunity to express their views and thus bring to the attention of the Holy See not only the best traditions of the East, but also the needs of the day. It was the hope of the Holy See that in this way the Commission in charge of the codification of the Eastern law could ultimately formulate a final draft of the canonical provisions incorporating the best and the very latest in juridical prudence. The Holy See also realized that in order to assure a sound administration of the law and in order to give the administrators a maximum of certainty, drastic steps had to be taken with regard to those portions of the existing law which were not incorporated into the new draft. Hence, in no uncertain terms and in a most sweeping manner the Holy Father abrogated all existing canonical provisions not incorporated in or contrary to the provisions in the new Code. This abrogative clause includes all legitimate customs and all canonical provisions whether they emanated from a local, provincial or ecumenical synod. It also includes all general as well as particular regulations issued by former Popes and the various Roman Congregations. In other words, regardless of what the laws or legitimate customs may have been, as of May 2, 1949, the only law governing marriages of Eastern rite Catholics is the law promulgated in the motu proprio *Crebrae allatae*. Nor could it be otherwise, for the main purpose which prompted the Holy Father to promulgate the new

Code, namely the elimination of uncertainties and the unification of juridical practices, would have been frustrated from the start. To be more specific, the matrimonial provisions contained in the decrees of the Second Provincial Council of Mount Lebanon for the Maronites, and the same provisions of the Synod of Zamošč for the Ruthenians, both approved *in forma specifica,* are no longer binding upon the respective subjects unless they are incorporated in or allowances are made in favor of them in the provisions of the new Code. In like manner the matrimonial provisions contained in the Pontifical Decrees issued for the governance of Ruthenians residing in South America, the United States and Canada with regard to the form of mixed rite marriages (including the granting of necessary dispensations or other faculties needed in the case) are unquestionably abrogated.

This of course does not mean that the legislation of the motu proprio *Crebrae allatae* does not have its limitations. With all due respect for the learnedness, prudence and juridical ability of the codifiers, the new Code does contain several obscure points; there might arise in the future a situation not contemplated by the new Code; we undoubtedly will experience some difficulties and hardships in introducing some changes demanded by the new law. These things must be expected in all human legislation, especially in a legislation of such broad scope as the new Code.

These limitations in the new law might serve as a basis for a demand of clarification or for the granting of new legislation or for the granting of some exception. I do not believe, however, that these limitations could be used as a sound basis to nullify or to call into doubt the clear and all embracing abrogative clause of the Supreme legislator of the Church.

Broadly speaking it is correct to say that the new Code is substantially the same as the Latin Code. Of course allowances had to be made for the special position occupied by the Patriarchs; [2] special consideration had to be given the fact that

[2] For instance can. 32 gives the Patriarchs certain ordinary faculties which other Hierarchs do not have.

many rites are no longer confined to their native lands; special consideration had to be given some customs deeply rooted in the traditions of a given people or to some juridical consequence which inevitably flows from a legitimate custom; and, unless I am mistaken, the Holy See gave special consideration to her perennial efforts to promote and speedily consummate the reunion of Dissident Churches.

Thus the multiplicity of affinity arising from *digeneia* and *trigeneia* was recognized in some instances by the new Code because of the sensibilities of the people involved.[3] The distinction between a public and private simple vow of chastity [4] had to be emphasized because of the fact that in some regions married men are admitted to the priesthood and are allowed to live a normal married life while still active in the ministry. The requirement of the *ritus sacer* in mixed marriages [5] was probably incorporated as a gesture of good will and as a basic recognition of the substantial difference between the Dissident Churches and Protestant sects.

Before entering upon a detailed discussion of the points chosen for this paper it might be useful to enumerate some of the major differences between the Eastern and Western Codes:

> Canon 32 is entirely new and it fills in a lacuna found in the Latin Code. Certain delegated faculties with regard to matrimonial impediments which the Latin Ordinaries

[3] See canons 67-68.

[4] Can. 48. § 1. Matrimonium prohibet: 1. Votum publicum castitatis perfectae in professione simplici seu minore emissum.

[5] Can. 85. § 1. Ea tantum matrimonia valida sunt quae contrahuntur ritu sacro, coram parocho, vel loci Hierarcha, vel sacerdote cui ab alterutro facta sit facultas matrimonio assistendi et duobus saltem testibus, secundum tamen praescripta canonum qui sequuntur, et salvis exceptionibus de quibus in cann. 89, 90.

§ 2. Sacer censetur ritus, ad effectum de quo in § 1, ipso interventu sacerdotis adsistentis ac benedicentis.

enjoy by virtue of the Quinquennial Faculties are, by virtue of this canon, enjoyed by the Eastern Prelates as ordinary faculties.

Canon 35, § 4 (CIC [the Latin Code, canon] 1045) incorporates the provisions contained in CIC 81.

Canon 48 (CIC 1059) recognizes the distinction between the public and the private vow of chastity for the reason mentioned above.

Canon 62 (CIC 1072) adds a second paragraph making the subdiaconate—otherwise a minor order—a diriment impediment.

Canons 67-68 (CIC 1077) on affinity are entirely new.

Canon 70 (CIC 1079) on spiritual affinity is entirely different from its Latin counterpart.

Canon 80, which probably replaces CIC 1091, is new and deals with marriage by proxy, while CIC 1090, which deals with marriage through an interpreter, is entirely omitted.

Canons 85-92 (CIC 1094-1103) deal with the form of marriage and incorporate some new legislation which we will discuss at length. In this connection especially significant is the requirement " ad validitatem " of the *sacer ritus* which thus necessitated the omission of CIC 1101-1102.

As for the remaining canons they are substantially the same as those of CIC.

For reasons quite obvious it would be impossible to consider the entire legislation in the limited time alloted for this paper. Hence, I intend to limit the formal discussion to the following topics: 1) Consanguinity and affinity, 2) the *sacer ritus* in mixed marriages, and 3) the canonical form of marriages. Other points of interest might be developed through a discussion from the floor.

Consanguinity

Canon 66 [6] provides that marriages between blood relatives in all degrees of the direct line are null and void; furthermore, blood relation in the collateral line nullifies marriage up to and including the sixth degree; in case of doubt concerning the existence of blood relationship in any degree of the direct line or up to and including the second degree of the collateral line marriages are never permitted. Canon 66 has a fourth paragraph not to be found in CIC 1076, its Latin counterpart. In reality, however, this fourth paragraph is the Eastern version of CIC 96 which gives the manner of computing the degrees of consanguinity. Except for two exceptions, canon 66 is the same as CIC 1076. Unlike the Latin Code the Eastern legislation calculates the degrees of consanguinity by taking into consideration all generations on both sides of the collateral lines, whereas the Latin Code takes into consideration only one—the longer—line. The superficial observer might say that the sixth degree in the Eastern Code is the same as the third in the Latin Code. The fact is that this would be true only if there would be an equal number of generations on both sides. Thus if one side of the line should have four or five generations and the other, one or two, the Latin Code would permit marriage in the fourth and fifth generations while the Eastern Code would prohibit same. Like the Latin Code the motu proprio *Crebrae allatae* admits multiple consanguinity arising from one reason only, namely, by reason of the multiplication of the common stock.

[6] Can. 66. § 1. In linea recta consanguinitatis matrimonium irritum est inter omnes ascendentes et descendentes tum legitimos tum naturales.

§ 2. In linea obliqua irritum est usque ad sextum gradum inclusive, ita tamen ut matrimonii impedimentum toties multiplicetur quoties communis stipes multiplicatur.

§ 3. Nunquam matrimonium permittatur, si quod subsit dubium num partes sint consanguineae in aliquo gradu lineae rectae aut in secundo gradu lineae obliquae.

§ 4. 1°. Consanguinitas computatur per lineas et gradus;

2°. In linea recta, tot sunt gradus quot personae, stipite dempto;

3°. In linea obliqua, tot sunt gradus quot personae in utroque tractu, stipite dempto.

Of greater interest in this country will be the collision of laws arising from an inevitable situation. Because of the great frequency of intermarriages between Catholics of different rites a situation might arise where a Latin would contemplate marriage with an Oriental to whom he might be related in the fourth, fifth or sixth degree of consanguinity in the collateral line according to the Eastern computation. According to his own law he is free to marry, but according to the law of his prospective bride his marriage would be null and void. Discussing this case Cappello [7] believes that the Latin party would communicate immunity from this impediment to the Eastern rite party. He bases his opinion on the fact that consanguinity is a correlative entity and consequently when it ceases for one it must cease for the other. This argument is not too convincing for by the same token it could be said that the binding force of the impediment on one party would be communicated to the other party.

We have here an instance of the limitation of the new Code. Without discrediting the magnificent work done by the codifiers it seems simpler to admit the fact that they did not advert to the possibility of this situation and hence did not make provisions for juridical relief. We must remember that the codifiers were primarily concerned with the codification of Eastern juridical traditions. In the East, perhaps until recently, the situation contemplated in our case was not likely to occur. True, in all probability the situation more than likely occurred with greater frequency in Central Europe and America where mixed rite marriages were quite common. Evidently the Prelates consulted and their advisors simply overlooked this situation and consequently did not ask for juridical relief. It seems to me then that the simplest procedure would be to call the legislator's attention to the situation and ask for a specific ruling on the case. Hence, it was

[7] *Tractatus Canonico-Moralis de Sacramentis*, III, *De Matrimonio* (4. ed., Romae: Marietti, 1939), n. 517.

proposed to present to the Sacred Congregation for the Oriental Church the following *dubium:*

> "If a Latin male contemplates marriage with an Oriental woman to whom he is related in the fifth or sixth degree of consanguinity of the collateral line, can he contract a valid marriage without benefit of a dispensation from the impediment of consanguinity in the fourth, fifth and sixth degrees as contemplated in canon 66, § 2"? "If not, which Prelate is qualified to grant the dispensation"?

In the meantime, lest the marriage be invalid a dispensation should be obtained from the respective Oriental Prelate, who in virtue of canon 32,§ 1 has ordinary faculties to dispense from the impediment of consanguinity in the fifth and sixth degrees of the collateral line.

Affinity

Canons 67-68 represent a revised version of a very complicated Eastern legislation governing affinity.[8] These canons

[8] Can. 67. § 1. 1°. Affinitas de qua in can. 68 § 1, dirimit matrimonium in linea recta, in quolibet gradu; in linea obliqua, usque ad quartum gradum inclusive;

2°. Affinitas de qua in can. 68 § 2, dirimit matrimonium usque ad quartum gradum inclusive;

3°. Affinitas de qua can. 68 § 3, dirimit matrimonium in primo gradu.

§ 2. Affinitatis de qua in can. 68 § 1, n. 1, impedimentum multiplicatur;

1°. Quoties multiplicatur impedimentum consanguinitatis a quo procedit;

2°. Secundo vel ulteriore matrimonio inito cum consanguineo coniugis defuncti.

Can. 68. § 1. 1°. Affinitas ex digeneia oritur ex matrimonio valido etsi non consummato;

2°. Viget inter alterutrum coniugem et alterius consanguineos;

3°. Qua quis linea et quo gradu, alterutrius coniugis est consanguineus, alterius est affinis.

§ 2. 1°. Iure particulari, affinitas ex digeneia de qua in § 1, n. 1, oritur etiam inter consanguineos viri et consanguineos mulieris;

2°. Ita computatur ut tot sint gradus quot fert summa graduum consanguinitatis quibus uterque affinium distat a coniugibus ex quorum matrimonio affinitas oritur.

differ from their Latin counterpart (CIC 1077) in that in addition to affinity existing between the husband and the wife's blood relatives and the wife and the husband's blood relatives, in some instances the new Code recognizes affinity as a diriment impediment between the blood relatives of the spouses, and affinity resulting from *trigeneia* which arises from two valid marriages, even though not consummated, when the spouses contract marriage successively with the same third party after the first marriage is dissolved, or with two different persons related to each other by blood.

As in the Latin Code affinity in the direct line nullifies marriage in all ascending and descending degrees; unlike the Latin Code the Eastern Code nullifies marriages when contracted in the fourth degree inclusive of the collateral line. This incidentally is a departure from the old Eastern discipline which considered affinity in the sixth degree of the collateral line a diriment impediment.

Affinity *ex digeneia* existing between the blood relatives of both spouses nullifies marriage in the fourth degree inclusive of the collateral line (the old discipline established the fifth degree as a diriment impediment).

Affinity *ex trigeneia,* i.e. one resulting from two marriages, nullifies marriage in the first degree. Thus marriages between stepfather and the wife of his stepson or between stepmother and the husband of her stepdaughter are null.

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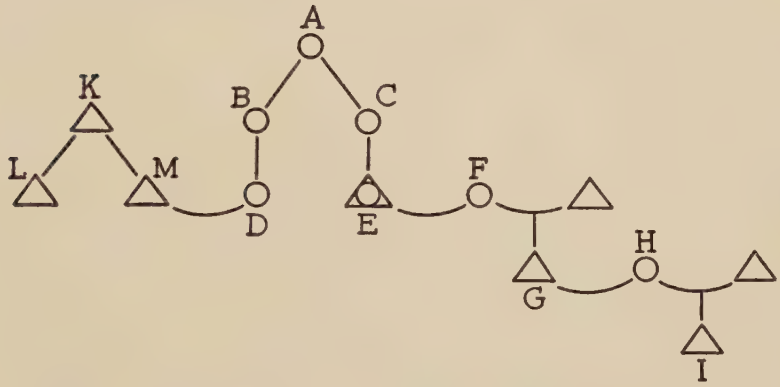
§ 3. 1°. Iure particulari, affinitas praeterea oritur ex trigeneia seu ex duobus matrimoniis validis, etiam non consummatis, si duae personae matrimonium contrahant: a) cum una eademque tertia persona, soluto matrimonio, una post alteram, aut b) cum duabus personis inter se consanguineis;

2°. Affinitatem ex trigeneia contrahunt alteruter coniux cum iis qui sunt, ex alio matrimonio, alterius coniugis affines ex digeneia;

3°. Haec affinitas, inter alterutrum coniugem et alterius affines, ita computatur ut qui sunt ex alio matrimonio affines viri ex digeneia, in eodem gradu sint uxoris affines ex trigeneia, et vice versa;

4°. Quoties haec affinitas viget inter consanguineos quoque unius et affines alterius coniugis, ita computatur ut tot sint gradus quot fert summa graduum cum consanguinitatis tum affinitatis ex digeneia quibus uterque affinium distat a coniugibus ex quorum matrimonio affinitas oritur.

The degrees of affinity in the collateral line are computed in the same manner as that used in the computation of the degrees of consanguinity, and this impediment is multiplied as often as the impediment of consanguinity from which it stems is multiplied, or by contracting two or more marriages with the blood relatives of the deceased spouse.



M and E are *affines* in the fourth degree.
K and A are *affines* in the third degree.
I and E are *affines ex digeneia* in the sixth degree.
M and F are *affines ex trigeneia* in the fourth degree.

It must be noted that affinity between the blood relatives of the spouses and affinity *ex trigeneia* are recognized as diriment impediments only in those cases where a particular law clearly stipulates the same. For practical purposes the following summary can be made: Armenians, Maronites, Melkites and Ruthenians are only bound by affinity described in canon 68, § 1. The Romanians are certainly bound by affinity described in canon 68, § 2 since this is clearly defined in the decrees of the First and Second Provincial Synods of Alba-Julia (1872 and 1882). Perhaps the same can be said of the Chaldeans and the Syrians (Nomocanon Bar Hebraeus). I say perhaps, because the information available is not sufficient to formulate a definite statement.

Ritus Sacer

Canon 85, § 1 (CIC 1094) stipulates that in addition to the presence of a duly qualified priest and the two witnesses a marriage, in order to be valid, must be contracted in conjunction with the prescribed sacred ritual. Paragraph 2 further states that in order to obtain the canonical results contemplated in the first paragraph the mere assistance of the priest is not sufficient, he must also *bless* the marriage.[9] In this connection there are several other significant facts. Canon 59, which corresponds to CIC 1064, does not have the fourth paragraph of the Latin canon for the very simple reason that CIC 1102 is entirely omitted in the Eastern Code. Furthermore, canon 98, which corresponds to CIC 1109, studiously omits the reservation "matrimonium inter catholicos", and likewise paragraph three of CIC 1109 is entirely omitted in the Eastern Code.

From the above it is quite clear that the legislator made a studied effort to make it clear that all marriages contracted by Orientals are to be solemnized in the church with the use of the prescribed ecclesiastical ritual. It should be noted that the Eastern rites do not have a ritual corresponding to that used by the Latin rite in this country solemnizing mixed marriages.

At this point I would also like to make it clear that, in view of what was said before, canon 85 simply recognizes the famous canons 90 and 199 of St. Nicephorus and the traditional contention of the Eastern Churches that in order to have a valid marriage, it must be solemnized in church.

The provisions of these canons give rise to many problems in the case of a mixed marriage. In the view of the fact that the Church merely tolerates the presence of non-Catholics at her religious services one can ask whether the provisions of the Eastern Code are indicative of a radical departure from the Church's traditional stand. If we further consider that all Eastern rituals prescribe that marriages be solemnized either

[9] See note 5.

immediately after the celebration of the Holy Sacrifice, or have intertwined with the marriage ceremony a special communion service, one might ask whether the Church is not offering the heathen or Protestant sectarian an occasion to show at least a negative irreverence towards the Blessed Sacrament. What about a Latin priest, acting as delegate in the solemnization of a mixed marriage between an Oriental Catholic and a non-Catholic? Is he to follow the provisions of CIC 1109, § 3, which appear to be merely prohibitive, or is he to follow those of canon 85 of the motu proprio *Crebrae allatae* which are required "ad validitatem"?

The apparent contradiction between canon 85 and CIC 1109, § 3, possibly can be resolved if we bear in mind the primary intention of the legislator in both instances.

The CIC was primarily intended for the governance of Latins, who, among other things, have frequent and inevitable commerce with Protestant sectarians and modern heathens. Since the law must consider that which is common, the CIC had to give primary consideration to mixed marriages between Catholics and Protestant sectarians rather than to those between Catholics and Dissidents which, in the West, were not too frequent.

It is common knowledge that very few Protestants, if any, believe marriage to be a sacrament in the Catholic sense, none of them believe in the Real Presence and consequently all refuse to show due reverence and adoration towards the Blessed Sacrament. In view of these circumstances and in order to prevent any voluntary or involuntary irreverence towards the Blessed Sacrament, not to mention other reasons, the Church was forced to take preventive measures. This was achieved by forbidding ecclesiastical ceremonies in mixed marriages, even though occasionally some Dissident, who believes in the sanctity of marriage, the Real Presence and in the sacredness of the ecclesiastical ritual, was denied the spiritual benefits that accrue to those who assist devoutly at sacred rites.

The motu proprio *Crebrae allatae,* on the other hand, was primarily intended for the East, even though great numbers of Easterners are now found in the West facing the same problems as the Latins. Protestant sectarians made little headway in the East. Commerce between the baptized and the non-baptized population of the East is rather strained. Hence, as far as mixed marriages go in the East, the most frequent case is a marriage betwen a Catholic and a Dissident. Dissidents, however, believe marriage to be a sacrament in the Catholic sense, they believe in the Real Presence, they look upon the ecclesiastical ceremonial as something sacred. Hence, in the most common case of a mixed marriage in the East there appears to be no need for the special precautions against irreverence and consequently no need for the prohibitive measures mentioned in CIC 1109, § 3. It will not be amiss to remember that the professed intention of the Holy See was to preserve intact, as much as possible, the juridical and liturgical traditions of the East. She had taken special pains not to offend the sensibilities of the people in the East by acknowledging those customs which in no way militate or offend against the *depositum fidei.* One of the deeply rooted convictions of the East is that only those marriages are valid which are contracted in church in conjunction with the prescribed ecclesiastical ritual. It is also likely that the Holy See was motivated by the desire to impress upon Dissidents of the East that she does not consider them to be the same as Protestant sectarians, and that she is willing to go to the limit of concessions in promoting and speedily accomplishing the reunion of East and West.[10]

[10] Lately a number of priests have experienced the fact that lax Catholics as well as non-Catholics have come to look upon marriages performed in the rectories as less sacred. Hence divorced people ask that perhaps their sinful union could be validated by a "private" ceremony in the rectory. In view of these circumstances it was suggested that perhaps the Church intends to combat this misconception by ordering that all marriages take place in the church.

This still leaves the case of mixed marriages involving Catholics and Protestant sectarians or non-baptized persons open to question. The fact that they occur infrequently does not offer much consolation because according to canon 85 the ecclesiastical blessing is required for the validity of all marriages. Some consolation may be found in the fact that according to canons 50-56 and 60-61 the Hierarch must investigate each individual case and thus perhaps is in a position to prevent irreverence. Of course the case of those Easterners who live in the West makes things even more difficult.

In view of the conflict between provisions in both Codes and the gravity of the reasons that apparently prompted these legislations it was suggested that the following *dubia* be submitted to the Holy See:

> " In order to contract a valid mixed marriage are all non-Catholics contracting marriage with Catholics of the Eastern rites to be admitted to the *sacer ritus,* as contemplated in canon 85, or is it necessary to distinguish between Dissidents on the one hand and Protestant sectarians and non-baptized persons on the other "?
>
> " If Protestant sectarians and non-baptized persons are to be excluded from the *ritus sacer* in mixed marriages, what ceremonies are to be used and in what place is the marriage to be celebrated in order to be valid "?

In the meantime what is a Latin priest supposed to do when he is called upon to witness a marriage in which the Catholic party is of an Eastern rite? Two procedures can be suggested: 1) He could ask the Ordinary for permission to perform the prescribed liturgical ceremony as provided in CIC 1109, § 3. Of course in such places where such is not the custom many eyebrows might be raised and it could be interpreted as a precedent. 2) To avoid this situation one could use the procedure authorized by canon 87, § 3, namely, the local Ordinary could delegate some Oriental priest to assist at the marriage in his own church where it is not apt to cause

any commotion since the solemnization of mixed marriages in church is not unusual among Orientals.

The Canonical Form of Marriages

Undoubtedly the most important features of the new Code are the provisions regulating the canonical form of marriage. These provisions are given in canons 85-92 (CIC 1094-1103). In addition to some new provisions, adapted to the needs of the Orientals, these canons incorporate the provisions of CIC 94 and almost all the provisions of CIC 1094-1103. As in CIC only those marriages are valid which are contracted in the presence of the pastor, the local Hierarch, the *vicarius co-operator,* if properly delegated, or a determinate priest appointed by either of the aforementioned clerics and two additional witnesses. There are however many provisions which either differ from or are not contained in the CIC. Of these, three are of particular importance, viz., the priest must be of the same rite as the contracting parties or, if of a different rite, must have proper delegation; marriages between Catholics of different rites, without any exception, must be solemnized in the church of the groom and in the presence of the groom's pastor; and lastly, all marriages, including mixed marriages, must be solemnized in conjunction with a *sacer ritus.*

The Code contemplates the following possible combinations of marriages: a) between an Oriental Catholic and a non-Catholic; b) between two parties of the same rite; c) between two Catholics who belong to two different rites; d) between two Oriental Catholics who have no pastor of their own rite, and between a Latin and an Oriental who has no pastor of his own rite.

With reference to mixed marriages the new Code reiterates the provisions of CIC stating that marriages of this kind must be solemnized in the presence of a duly qualified priest., viz., the pastor of the Catholic party or some other priest who has received proper delegation. As was already mentioned the

marriage must be solemnized in church in conjunction with a *sacer ritus*. It should be noted that canon 98, § 2, authorizes the bishop to permit the solemnization of a marriage in a private home whenever a just cause prevails. This would seem to indicate that the solemnization of a marriage in church is not required for validity.

When both parties to the marriage are Catholics of the same rite the marriage must take place in the church of the groom and in the presence of the groom's pastor. However, if by a legitimate custom or some particular law marriages in the past were solemnized in the church of the bride and in the presence of the bride's pastor, this practice may be continued. This means, among other things, that in this country and in Canada Catholics of the Byzantine-Slavonic rite who were bound by the provisions of the decree *Ne temere* may continue to have marriages solemnized in the church of the bride and in the presence of the bride's pastor.[11] Such in fact is the rule in the Exarchate of Pittsburgh.

When the parties belong to two different rites it is required *for validity* that the pastor be of the same rite as at least one of the parties to the marriage. The licitness of marriage requires that it take place in the church of the groom and in the presence of the groom's pastor. It should be noted that the new Code abrogates the clause "nisi aliud particulari iure cautum sit" (CIC 1097, § 2), and henceforth Catholics of the Byzantine-Slavonic rite residing in Canada, the United States and South America can no longer follow the provisions of the decree *Ne temere* when marrying Catholics of a different rite.

It is a well known fact that today Catholics of the Eastern rites are no longer confined to their native lands. They can be found in places where for centuries the Latin rite predominated. In some instances their number warranted a separate parochial or even diocesan organization. In other instances Oriental Catholics affiliated themselves with the local Latin parish. Limiting our considerations to the situation existing

[11] S. C. pro Eccl. Or., decr. *Cum data fuerit*, 1 mart. 1929, art. 39—*AAS*, XXI (1929), 159.

in Canada and the United States we find the following combinations: 1) Ruthenians with a separate Hierarchy of their own rite, and 2) Orientals who do not have a Hierarchy of their own rite and in accordance with the provisions of Pope Leo XIII [12] are now subject to the local Latin Ordinary.

In the case of the second group, that is, those who have no Hierarchy of their own rite, we find three possible combinations: a) they may have a parish of their own rite with a pastor of their own rite; b) they may have a parish of their own rite with a pastor of a different rite; c) their number being too small they may rightfully belong to the nearest church of the Latin rite. In all three instances the pastor and the faithful are under the jurisdiction of the local Latin Ordinary by special mandate of the Holy See.

When Orientals, who have a parish of their own with a pastor of their own rite in charge, contract marriage between themselves they must do so in their own church and in the presence of their own pastor or his duly appointed delegate. Thus, without a special delegation from the local Ordinary, two Maronites having their own church and a pastor of their own rite could not contract a valid marriage in some other church and in the presence of a priest of a different rite, even though that priest be subject to the same bishop. On the other hand if the Orientals have a church of their own rite but have no pastor of their own rite the local Latin Ordinary could grant any priest even though he is not of the same rite general faculties to assist at the marriages of those people. Thus, for instance, in an Eastern Pennsylvania town the Syrians have a church of their own, but their pastor is a priest of the Latin rite. In this case the local Ordinary can grant general faculties to the Latin pastor to assist validly at the marriages of Syrians in the Syrian church. Dealing with this situation canon 87, § 3 among other things states that "Locorum Hierarchae . . . dare possunt cuiusvis orientalis ritus rectoribus ecclesiarum vel aliis sacerdotibus, curam fidelium, parocho

[12] Leo XIII, litt. ap., *Orientalium dignitas,* 30 nov. 1894, n. ix—*Collectanea S.C.P.F.* (2 vols., Romae, 1907), n. 1883.

proprii ritus orborum, habentibus, generalem facultatem, etc." The fact that the above quoted canon gives first preference to rectors of an Eastern rite church might indicate that the Holy See would give the Eastern rite clergy first preference in this matter.

In the case of those Orientals who have no parochial organization but are affiliated with a Latin rite parish, the local parish priests and their duly appointed delegates can assist validly at the marriages of these people. There might be a question, particularly in a large city, as to what local Latin parish these people should belong to. This can and should be regulated by diocesan legislation setting forth clearly whether these Orientals have a choice in this matter or whether they are bound to affiliate themselves with the territorial parish. On the other hand it would seem that the bishop has the right to decree that any parish priest or his duly constituted delegate may validly assist at the marriage of Orientals " parocho proprii ritus orborum."

There can be another question, perhaps of greater importance, which should also be settled by diocesan legislation or by a special ruling of the Holy See. For instance in the City of Cleveland there is a Romanian church for Catholics of the Romanian rite. Undoubtedly there are some Romanians who live in the City but at a great distance from their parish church. Because of convenience and other recognized reasons they attend and support the local Latin parish in the neighborhood. Could the parish priests in the neighborhood church validly assist at the marriages of these Romanians without special delegation? Can general delegation be granted in similar cases with due insistence on the three mile limit? Does the Romanian pastor have exclusive jurisdiction over these marriages? These are some of the questions that the interested Chanceries will have to solve immediately or perhaps will have to present to the Holy See for authoritative solution.

The Ruthenians represent a special problem. They have their own hierarchy and because of this have been withdrawn

from the jurisdiction of the local Latin bishops. There are large numbers organized in parochial units placed under the care of duly appointed pastors. But there are a number of small groups of Ruthenians, especially since the last war, who do not have a church or a parish of their own rite. In accordance with the provisions of the common law these Ruthenians for the time being should affiliate themselves with the nearest Catholic church. Notwithstanding the fact that according to the provisions of article 28 of the decree *Cum data fuerit,*[13] they are bound to fulfil their religious obligations in the nearest Catholic church and also seek the sacraments there, and in virtue of article 36 of the same decree they are authorized to observe the Latin customs with regard to holy days and the fast discipline, legally they remain under the exclusive jurisdiction of their own Hierarch. As a consequence, in some matters the local Latin pastor or bishop has no jurisdiction over them. The decree *Cum data fuerit* had made provisions to remedy the situation by stipulating (article 19) that "... the Ordinaries communicate their jurisdiction over faithful of the Greek-Ruthenian rite to a priest of the Latin rite at the place, and notify the Ordinary of what they have done. ..." Presumably, it is up to the local Latin clergy to notify the Greek-Ruthenian Bishop of a similar situation in their parish and to seek the specified remedy. Unfortunately this important provision had gone unnoticed by the bulk of the Latin clergy. As a result every now and then the local clergy presume to do certain things which are not only illegal but which often were interpreted as a manifestation of contempt.

Canon 86, § 3, 2° repeats this provision with reference to marriage stipulating that if the faithful of a given rite do not

[13] "The faithful of the Greek-Ruthenian Rite are bound to attend and liberally to support their own churches, and to observe the prescriptions of their own Rite. But in districts where there are no churches nor priests of their Rite, and where, owing to the distance, they cannot go to their own church without grave inconvenience, they must, in order to fulfill the precepts of the Church, hear Mass in a Catholic church of another Rite, and receive the Sacraments from a priest of another Rite" (Decree *Cum data fuerit,* art. 28; Bouscaren, *The Canon Law Digest,* I [Milwaukee: The Bruce Publishing Co., 1934], 13).

have a pastor of their own rite, then their Hierarch must commit their care to a pastor of another rite having obtained the consent of that particular pastor's bishop. Two things should be noted about this provision which has a bearing on the proper relation between the Latin clergy and the Ruthenian faithful, viz., 1) that it is one of the qualifications required for valid assistance at a marriage between two Ruthenians or between a Ruthenian Catholic and a non-Catholic; 2) that while the decree *Cum data fuerit* simply required that the Ruthenian Bishop notify the Latin Bishop of this delegation of jurisdiction, the new Code requires that before this jurisdiction is communicated to the Latin pastor his Ordinary's consent must be obtained. In view of the fact that the observance of this provision might affect the validity of a marriage when both parties are of the Ruthenian rite it might be well to bring this provision to the attention of the clergy at large, as well as that of article 19 of the decree *Cum data fuerit.*

* * * * *

I should like to bring this paper to a close with some observations concerning the anxiety shown by the Ruthenian clergy because of the new provisions of the motu proprio *Crebrae allatae* which makes mandatory the solemnization of mixed rite marriages in the church of the groom and in the presence of the groom's pastor.

For reasons which we cannot discuss at this time, it took a long period of time before the rights of Ruthenian pastors have gained effective recognition. The last twenty years marked a steady improvement in mutual relations between the clergy of the East and the West and gradually more priests of the Latin rite recognized the fact that their Ruthenian brethren had the same claim as they to justice and to the protection of the law. This was particularly true with regard to a pastor's right in the case of mixed rite marriages. But even so, quite often members of the Latin clergy would request permission to solemnize a marriage which rightfully

belonged to their Ruthenian neighbor, many of whom were of the opinion that the requests for an exception from the observance of the law far exceeded what one might call a fair number. Hence, when because of grave reasons, the bishop did authorize the solemnization of such marriages in a different rite, many believed the bishop to be too generous in granting these exceptions. More vexing were those cases in which the much abused axiom "salus animarum suprema lex esto" was invoked as the sole motive for an exception to the law.

Most of us probably realize that today the fallacy of liberalism with regard to the true nature of law has gained a firm grip not only on the laity but in many instances on the clergy as well. As the days go by, fewer people seem to realize that the law is not a barrier to or a destroyer of human freedom; fewer people realize that the law is a powerful bulwark and support of human liberty. Too many have forgotten that the law—natural as well as positive—was primarily intended as a powerful aid to one's salvation and that consequently only in exceptional cases is one justified in by-passing the law. Too many clerics would consider the exception to be the rule, nay, we have reached the stage where some clerics in high stations regard knowledge and observance of the law to be a personal demerit.

In view of these and other circumstances the question foremost in the mind of the Ruthenian clergy is this: if under the old law—uniformly observed by East and West—much difficulty was experienced in this matter, will not the change increase these difficulties? The fact that henceforth there will be two divergent practices in the solemnization of marriage—the reasons for which are not clear to clergy and laity alike—is apt to make matters more difficult, for it is taken for granted that marriages should be solemnized in the church of the bride.

Reliable information from circles close to the Holy See has it that the change was prompted by a desire to stop leakage in the Eastern rites. In fact, the bishops in Europe and in

the Near East were very happy about this turn of events. Theoretically the new discipline can do much in the way of stopping leakage, but the success of this law will ultimately depend on the manner in which the law is administered. It will require more than an ordinary amount of good will and willingness to cooperate. Because of these and similar reasons, the Ruthenian bishops in this country and Canada were very circumspect in enforcing the new law with regard to the form of mixed rite marriages.

I have been authorized to announce that as far as our Exarchate is concerned, the clergy received notification to the effect that as of January 1, 1950, all provisions of the motu proprio *Crebrae allatae* must be observed conscientiously, especially with regard to the form. This means that in marriages of mixed rites, the marriage must be solemnized in the church of the groom and in the presence of the groom's pastor. When both parties to the marriage are of the same rite, the marriage is to be solemnized in the church of the bride and in the presence of the bride's pastor.

We realize that the suddenness of this decision will mean many changes in marriages planned for the near future. Consequently, many exceptions will have to be made before the present law is sufficiently publicized. It is my opinion that by Easter the new law can be sufficiently publicized, especially during the Lenten period, and consequently after that date more serious reasons would be required for an exception from the observance of the law.

At the request of my Bishop and on his behalf, I wish to express to the Fathers present his gratitude for the good will and cooperation shown thus far. But His Excellency also asks that in the future every effort be made to carry out not only the letter but also the sublime intent of the Holy See. Officially the Eastern Church is no longer in existence in Europe. Truly then the Eastern Church in America can be considered the Isaian "remnant nation" destined to bring back the Dissident East. Without the sincere aid and cooperation of our Latin brethren we could not nurse this "rem-

nant nation" along and make it the powerful means of reunion the Holy See wants it to be. Hence, the plea of my Bishop to the Most Reverend Archbishops and Bishops and to the Chancery Officials for a just and firm administration of the motu proprio *Crebrae allatae,* for undoubtedly the failure or success of this new marriage legislation will determine the promulgation or non-promulgation of the remainder of the Oriental Code reportedly completed and ready for enactment.

MAX BERNAT, SEPARATIST

Max Bernat, a citizen of Chicago, aggrieved by the employment of clergymen in aid of Illinois divorce courts, tested the constitutionality of a Domestic Relations Act which became effective last December as a result of many years of planning on the part of the Chicago Bar Association. Section 12 of which authorized the assistance of representatives of the religious denomination of the estranged parties in attempting the reconciliation of the latter. The Chicago Bar Association, because of its labors in behalf of this legislation, was allowed in intervene as a friend of the court.

Though other sections of the Act were also found unconstitutional for other reasons, the Supreme Court of Illinois regarded section 12 as contravening the decision of the Supreme Court of the United States in the McCollum case. This conclusion, reached on March 22, was presented in language averring: "In like manner and to a greater degree than in the McCollum case, by permitting a master in chancery to summon the minister, priest, rabbi . . . to a hearing for the purpose of effecting a reconciliation, the statute utilizes a tax-established and tax-supported instrumentality . . . to aid religious groups to spread their faith."

One is perhaps justified in detecting a note of anti-Catholic animus in the decision because it took pains to insist that divorce is more abhorrent and reprehensible to some religious faiths than to others and that some of these do not recognize the validity of a divorce decree rendered in a civil court.

Cf. *People ex rel. Bernat* v. *Bicek,* 91 N.E. (2d) 588.

THE INTERNATIONALIZATION OF JERUSALEM

THE question of the Holy Places in Palestine is one of the oldest problems that have arisen under international law. It is even older than our modern international law itself, inasmuch as the latter came into existence only when the society of independent states emerged in Europe from the ruins of medieval, Christian universalism. The places at which our Saviour lived, suffered and died are not only sanctified to all of Christendom; Jews and Mohammedans also attach to Jerusalem and its environs sacred memories, according to their beliefs.

Whenever in history a new conqueror brought the Holy Land under his domination, the law regulating worship at the Holy Places and the access to these, the rights of the various communities to occupy, to administer and to preserve the sacred sites and buildings were newly ordered or confirmed. When such an internal regulation became the object of binding agreements or obligations, under customary law, between the rulers of Palestine and other sovereigns, the interreligious or property regulations affecting the Holy Places ceased to be of merely domestic nature: they assumed an international character. Thus it is reported that Charlemagne obtained from the Caliph, Harun al-Rashid, the right to protect the Christians and the Christian establishments in the Holy Land.[1] Accordingly, already in the ninth century regulations concerning the Holy Places would have existed which were binding upon the authorities of two dominant empires, the one representing Western Christianity, the other representing Islam.

From such international obligations concerning the order of religious life in Palestine and of the relations between the

[1] See Bernardin Collin, O.F.M., *Les Lieux-Saints* (Paris, Editions Internationales, 1948), p. 25.

religious communities in that country, acts are to be distinguished which concern the existence or the form of exercise of the supreme authority itself. Acts of this kind were set forth whenever sovereign power over Palestine was ceded from one dynasty or state to another, by a peace treaty or by a one-sided declaration of the conqueror. In the year 638 A.D. the Caliph Omar conquered the capital of Palestine and subjected the Holy Land, which until then had belonged to the Byzantine Empire, to Arab rule. In the year 969 Palestine became dependent on the Sultans of Egypt. In 1099 the Crusaders wrested the Holy Land from the infidels and erected the Latin Kingdom. In 1187 Jerusalem fell under Mohammedan rule again. The country remained under Egyptian domination until the Turks conquered it in 1517. They remained there for exactly 400 years. In the year 1922 Palestine became a British mandate under the League of Nations. This mandate was given up in 1948 when the Arab-Jewish fight for Palestine had broken out. The question regarding the supreme temporal jurisdiction over Jerusalem and the Holy Places is asked once more in our day. The answer is the more difficult, since it is not the transfer of the supreme power from one state to another that is under consideration at this time, but a division of the land between two nations, with the Holy Places in the midst of them.

The international problem of the supreme jurisdiction over Jerusalem is at present on the agenda of the United Nations. This problem overshadows what has been considered since the sixteenth century *the* question of the Holy Places, namely the continuous *actio finium regundorum* between the Christian communities, concerning their respective rights in the Sanctuaries. The history of this issue is largely the history of the defense of the rights of the Latins, represented by the Custody of the Holy Land, against the pretensions of the Greeks and the Armenians.[2] The right of worshiping at the Holy Places,

[2] For the history of this question see, among others: Pasquale Baldi, *La questione dei Luoghi Santi in generale* (Torino: V. Bona, 1918); Eugène Boré, *La question des Lieux-Saints* (Paris: Lecoffre, 1850); B. Collin, *loc. cit.*; An-

of having free access to them, finally of their occupation and administration must be ordered in a general settlement concerning sovereignty in Palestine. A brief survey of their historic development seems, therefore, appropriate.

After the Edict of Milan (313 A.D.), by which Emperor Constantine had given freedom to the Christian religion, the Sanctuary of the Holy Sepulchre was built on the Holy Places. Later the splendid Basilica followed, parts of which still remain. Saint Helen and her son, Emperor Constantine, erected another basilica in Bethlehem on the place of the Lord's birth. The divine service at the Sanctuaries was entrusted to the indigenous clergy under the Patriarchate of Antioch and, after 451, under the Patriarchate of Jerusalem.[3] The jurisdiction of Byzantium did not extend to the Holy City. As long as the *pax romana* ruled, pilgrims from all parts of the Empire arrived in Jerusalem. In the year 614 the Persians destroyed the Sanctuaries. They were rebuilt later.

When the Arabs entered Jerusalem the victorious Caliph immediately set a most important precedent. He said his prayers but on the outside stairs leading to the Church of Constantine. He wanted to avoid the possibility that, after his death, his fellow believers would seize the Sanctuaries because the great Caliph had prayed there to Allah. Actually during the following centuries the Christians were permitted to use the Sanctuaries, certain periods of persecution notwith-

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tonio Gassi, *Contributo alla soluzione della questione dei Luoghi Santi* (Jerusalem: Tipogr. PP. Francescani); César Famin, *Histoire de la rivalité et du protectorat des églises en Orient* (Paris: Didot, 1853); Romolo Tritonj, *Come va risolta la Questione dei Luoghi Santi* (Rome: Rassegna Italiana, 1925). For documentary sources see particularly: *Biblioteca Bio-Bibliografia della Terra Santa e dell'oriente Francescano* (Quaracchi: Collegio S. Bonaventura); Eutimio Castellani, *Catalogo dei Firmani ed'altri documenti legali emanati in lingue araba e turca concernenti i santuari, la proprietà, i diritti della Custodia di Terra Santa conservati nell' archivio della stessa Custodia* (Jerusalem: Tipografia PP. Francescani, 1922).

[3] See Collin, *ibid.*, p. 23; Amman, Jérusalem (Eglise de) in *Dictionnaire Théol. Cath.*, vol. VIII, part I, col. 938, n. 4 (quoted by *Memoriale sui Luoghi Santi,* Presentato dall'ordine dei frati minori [Rome: Guerra e Belli, 1945]).

standing. The Holy Places were to remain under the law of the Islam for 1300 years, with the exception of the 88 years of the Latin Kingdom. When the latter succumbed to the Arabs the Christian churches became the demesne of the new rulers, but they continued to be used as Christian sanctuaries under the control of the sovereign.[4] This legal status was also maintained under the rule of the Ottoman Empire.

Whether international obligations concerning the Holy Places existed before the establishment of the Latin Kingdom depends on the authenticity of the story that Harun al-Rashid gave a relative promise to Charlemagne.[5] During the second and longer period of Mohammedan rule over Palestine, Arab and later Ottoman sovereigns bound themselves by numerous international acts, conceding to the Christians rights in the Holy Places. The beginnings of these legal relations, after the downfall of the Kingdom of Jerusalem, was closely connected with the establishment of the Order of Saint Francis as Guardian of the Holy Sepulchre. The Franciscan monks had already used the armistices during the wars of the Crusades for going as pilgrims to the Sanctuaries in Palestine. Saint Francis himself went there in 1219 to venerate the Holy Places, and to consolidate by his presence the oriental mission of the Order.[6] After various attempts by Catholic princes to secure the rights of the Latin Christians, in 1333 Robert of Anjou, King of Naples and Sicily, and his wife, Queen Sancia, eventually obtained the important concession from Malek el-

[4] Concerning agreements in armistices between the Crusaders and the Arabs, regarding the Holy Places, see Baldi, *ibid.*, p. 12 (Richard Couer de Lion and Saladin); Leonard Lemmens, *Die Franziskaner auf dem Zion* (Aschendorff, Münster, 1925), pp. 24 ff. (the same as with Baldi); *Bibl. Bio-Bibl.*, v. I, pp. 158 f., II, 268 ff., 507 ff. (Frederic II and Malek el-Kamel: on the grounds of this armistice the Latin clergy resumed the divine service at the Holy Sepulchre).

[5] See Collin, above, n. 1.

[6] For the dark time between the fall of Jerusalem after the battle of Hattin, and the new grants by the Sultans residing in Cairo, see especially Gassi, *ibid.*, pp. 80 ff.

Nazar Mohammed, Sultan of Egypt and Syria, permitting the Franciscans to establish themselves at the Holy Cenacle on Mount Sion and in the Basilica of the Holy Sepulchre and to celebrate there solemn masses and other religious services.[7] Nine years later this agreement between the Christian and Mohammedan princes was announced by Pope Clemens VI from Avignon in the bulls *Nuper carissimae* and *Gratias agimus*. The Franciscan Order was confirmed by these bulls as Custodian of the Holy Places. It also appears from the mentioned bulls that the Latins received, in consequence of the treaty between Naples and Egypt, the full property (*dominium*) of the Holy Cenacle, where Christ instituted the Sacrament of the Holy Eucharist, as well as further rights of occupation (*possessio*) and of use (*usus*) in the Holy Places.[8]

However, the Latins had to share their rights with other Christian groups. As a result, rivalries and differences soon arose among the Christian communities. These differences and their settlement were later transplanted into the international field, due to the interest taken by the Christian states. Thus the international question of the Holy Places which originally concerned the rights, under Mohammedan control, of the Christians in general was extended to the issue between the individual Christian communities, Catholics on the one hand, schismatic Orientals on the other.

When at the beginning of the sixteenth century a war had broken out between Egypt and Portugal, and the Sultan, Quansou-Gouri, had closed the Holy Sepulchre, the Republic of Venice succeeded in obtaining the reopening of the Sanctuaries. In general, however, the Egyptian Sultans were favorable to the Latins, partly because they desired to entertain good commercial relations with the Western European states, partly because they considered Byzantium as their principal enemy.[9]

[7] *Bibl. Bio-Bibl.*, v. IV, pp. 40 ff.

[8] For details see Gassi, *ibid.*, pp. 90 ff.

[9] Collin, *ibid.*, p. 52; Gassi, *ibid.*, pp. 145 ff.

The situation changed entirely when Palestine became a part of the Ottoman Empire in 1517. The Turks had conquered Constantinople (1453) and soon afterwards the Greek orthodox Patriarch was recognized as *Rum Busci* (head of the Greeks). Favored by the Sultans, the power of the *Phanar* (the residence of the Patriarch) expanded to the schismatic Christians of all countries subject to the Turkish rule. The Patriarchates of Alexandria, Antioch and Jerusalem were subordinated to Constantinople and, under the first Greek Patriarch of Jerusalem Germanos (1534-1579), the Greek clergy began to displace the indigenous priests. From this time also date the continuous infringements upon the rights of the Latins. These infringements entailed counteractions in the international field, on the part of Catholic Powers of Europe. Especially Austria, France, Genoa, Naples, Poland and Venice extended their protection to the Latins residing in the Ottoman Empire and particularly around the Holy Places. This caused the Sublime Porte on frequent occasions to set forth in the so-called "Capitulations",[10] among other declarations, the rights of the Latin Christians which were under Ottoman jurisdiction.

The first Capitulations were granted to Venice, but after 1533 the Capitulations given to France became most important. The French diplomacy availed itself of its friendship with Turkey, directed against Austria, and of its ensuing mediatory position. On the other hand, the peace treaties concluded with the Turks by Austria and other Catholic states which joined her in the defense of the Christian occident contained like Capitulations. The Treaties of Carlovitz (1699), Passarovitz (1718), Belgrade (1739), Sistov (1791) between

[10] In the Capitulations "extraterritorial jurisdiction" was accorded to Christian states in respect of their subjects in the Ottoman Empire. The Mohammedan law did not extend to them because of its religious character. Compare: Philip Marshall Brown, *Foreigners in Turkey. Their juridical status* (Princeton: Princeton University Press, 1914); G. Pelissie du Rausas, *Le régime des capitulations dans l'Empire Ottoman* (Paris: Rousseau, 1905); George Young, *Corps de droit ottomane*, v. I, p. XII, v. II, pp. 122 ff. (Oxford: Clarendon Press, 1905).

the Empire and the Sublime Porte,[11] as well as the French Capitulation of 1740,[12] confirmed the *berat* (solemn diploma) of Soliman III which reinstated the Franciscans in their ancient rights. The Franciscans had been deprived of these rights on the grounds of false documents presented by the Greeks.[13]

On Palm Sunday of the year 1757 the Greeks of Jerusalem, under the leadership of their monks, expelled the Franciscans by force from the Holy Sepulchre. They succeeded in getting a *hatty-sherif* from the Sultan, according to which the Greeks were to share the rights in the Holy Sepulchre with the Latins and to receive other parts of the Sanctuaries including the Tomb of the Virgin and the whole Basilica of Bethlehem.[14] Pope Clement XIII asked collective action from all European courts. Their protests presented to the Ottoman Porte, however, remained without success. The situation in the Ori-

[11] In Article 13 of the Peace Treaty of Carlovitz the Grand Seigneur confirmed the privileges regarding the religious and the exercise of the Roman Catholic religion. To the ambassadors of the Empire it would be permitted to present their complaints and demands at the Porte in respect of the religion and the visitations at the Holy Places in Jerusalem. Similar provisions are to be found in the Treaty of Carlovitz with Poland and with Venice. Art. 9 of the Treaty of Belgrade confirmed the previous Capitulations with Austria, and mentioned especially the privileges of the Order of the Holy Trinity, called Ransomers of the Captives (see César Famin, *ibid.*, pp. 236, 272).

[12] Article 33 provided that the "Frank" religious who pursuant to ancient custom are established in and outside of Jerusalem, in the Church of the Holy Sepulchre, called *Kamana,* will not be disturbed anywhere in the Places of pilgrimage which they inhabit and which are in their hands, and which will remain in their hands as before, without their being disturbed, in regard to this, not even in the guise of taxation: and if they should happen to be involved in any process which could not be decided in the Places, this process will be submitted to the Sublime Porte. (Alfred de Testa, *Les régime des capitulations par un ancien diplomate,* p. 164. Quoted and translated from Gassi, *ibid.,* pp. 245 ff.)

[13] Alfred de Testa, *Recueil des traités de la Porte Ottomane avec les puissances étrangères* (Paris: Amyot, 1864–), v. II, p. I, n. XIV, pp. 318 ff.; De Gassi, *ibid.,* pp. 237 ff.

[14] See *Bibl. Bio-Bibl.,* v. XIV, pp. 121 ff.

ent had changed thoroughly since the Russian Empire had emerged as an orthodox Great Power. It overshadowed the might of the Greek Patriarch. In the Peace Treaty of Koutchouk-Kainardji (1774)[15] the Turks recognized Russia as protector over the Orthodox Christians residing in the Ottoman Empire. From this time on Russia outbalanced the influence in the Holy Places of the Catholic states, and particularly the protectorate over the Latin Christians in the Orient which France has claimed and traditionally exercised.[16]

The order as laid down by the *hatty-sherif* of 1757 has been little changed since. It has become known in the diplomatic language as the *status quo* at the Holy Places and has been maintained according to the rule of *uti possidetis*. When in 1808 the Basilica of the Holy Sepulchre was in great part destroyed by fire, a *firman* of the Sultan gave the Greeks the

[15] Art. 7. See Gabriel Noradounghian, *Recueil d'actes internationaux de l'empire Ottoman* (Paris: Cotillon-Pichon, 1897), v. I, p. 323.

[16] The French protectorate over the Latins has not been recognized by other Catholic powers or powers with Catholic populations, as far as their own subjects are concerned. See, *e.g.*, Franz von Liszt, *Das Völkerrecht*, 11th ed. (Berlin: J. Springer, 1921), pp. 96, 97.—The position of the Holy See in respect of the French protectorate was laid down in the circular letter of the Propaganda *Aspera rerum conditio* of 22 May 1888: "Norunt protectionem Gallicae nationis per regiones Orientis a saeculis esse invectam, et conventionibus etiam inter imperia initis firmatam. Quiapropter hac in re nil prorsus innovandum: protectio huiusmodi, ubicumque viget, servanda religiose est, eaque re monendi missionarii, ut si quando auxilio indigeant, ad consules aliosque Gallicae nationis administros recurrant." The Propaganda, however, did not recognize the French protectorate as an exclusive right. In the same letter the Austrian protectorate was upheld: "In iis etiam locis quibus Austriacae nationis protectio invaluit pariter absque immutatione teneatur" (Joseph Aubès, *Le protectorat de la France en Orient* (Toulouse: Saint-Cyprien, 1904), pp. 142 ff., 187). A letter from Cardinal Gasparri, Papal Secretary of State, to Mr. D. Cochin, member of the French Government, dated June 26, 1917, said that the French protectorate reposes on a threefold foundation: 1st, the Capitulations; 2nd, the order given by the Holy See to the Communities of the Levant to apply to France for their protection; 3rd, prerogatives granted to the French in the Orient by the Holy See in the course of the centuries. The letter of Cardinal Gasparri stressed in its further context the order of the Holy See to all Latin religious to apply for protection to the representative of France exclusively. On the other hand, the letter recognized like rights of other nations to protect the Catholics in the Orient (Collin, *ibid.*, pp. 119 ff.).

right to restore the church. As the right of repair of and in the buildings and sites of the Holy Places traditionally had been regarded as an emanation of the right of occupation and of use of the respective parts, the Catholic Powers took action again and obtained three *firmans* from the Sultan, guaranteeing that the restoration made by the Greeks should in no way be construed as impairing the rights of the Latins. The latter should obtain their possessions after the restoration of the church.[17]

In 1847 the Greeks took away the silver star which was until then fixed at the place in Bethlehem where Christ was born. They placed it in one of their convents. This star carried the inscription in the Latin language "Hic de Maria Virgine Jesus Christus natus est. 1717" and, therefore, was to be considered as an evidence of possession by the Catholics of this Sanctuary.[18] France sent Mr. Eugène Boré as Commissioner to the Holy Places. His report [19] served as a basis for the *démarche* at the Sublime Porte by the French Ambassador with the support of his colleagues from Austria, Sardinia, and Spain. They demanded the restoration of the Catholic rights as recognized in 1740. However, the Ottoman Porte, confronted with the menacing attitude of Russia, made only a few concessions and in the rest confirmed the *status quo* by a *firman* of 1852.[20] Prolonged exchanges of diplomatic notes and new *firmans* followed. The Sultan, under pressure both from France and from Russia, sought to resort to subterfuges. When the Tsar demanded irrevocable recognition by the Sultan of the privileges of the Orthodox clergy in the Ottoman Empire and the Sultan refused this, the Crimean War broke out.[21] The rape of the silver star of Bethlehem

17 Castellani, *ibid.*, nos. 1151, 1152, 1157.

18 Collin, *ibid.*, p. 98.

19 See above, n. 2.

20 Collin, *ibid.*, pp. 100 ff.; De Testa, *Recueil*, v. III, pp. 230 ff.

21 Compare De Testa, *Recueil*, v. III, pp. 274 ff. (circular letter from Count Nesselrode to the Russian diplomatic agents, 11 June 1853).

had been one of the immediate causes of this armed conflict.[22]

The Treaty of Paris (1856), which concluded the Crimean War, did not expressly mention the Holy Places or the question of the protectorate over the Christians in the Ottoman Empire. It stressed the exclusion of intervention in the relations of the Sultan with his subjects or in the internal administration of his empire (Art. 9).[23] In the Treaty of San Stefano, imposed on Turkey by a victorious Russia in March 1878, the Russian protectorate over the Oriental Christians was recognized. However, this Treaty was invalidated at the Berlin Congress, three months later. In the Treaty of Berlin Turkey conceded to everyone within her territory freedom of religion and of religious organization, equal rights for traveling clergymen and pilgrims, and the right of diplomatic and consular protection regarding these persons and their establishments, especially at the Holy Places. The rights of France were preserved and the *status quo* protected.[24] Neither were the French rights defined in their relations to Turkey and to the rights of protection by other powers, nor was there a description of the *status quo*.[25]

[22] The Ottoman Government supplied an imitation of the original silver star.

[23] Cognizance was taken, however, in the same article of a *firman* emanating from the free will of the Sultan improving the situation of the Christian subjects.

[24] Art. 62, par. 4-7 (Noradounghian, *ibid.*, v. IV, pp. 191 ff.).

[25] For criticism of the notion of the *status quo* at the Holy Places which appeared in the diplomatic language in 1852, see especially Collin, *ibid.*, pp. 110 ff. He confronts the rights under the *status quo* created by factual exercise or possession with the ancient titles of the Latins. The *status quo* is, according to the author, the factual equilibrium between the different communities which share the Holy Places. He then gives an outline of the *status quo* at the Holy Places, *i.e.*, at the Tomb of the Virgin, the Holy Sepulchre and in Bethlehem. A critical analysis of the *status quo* is also given by Gassi, *ibid.*, pp. 310 ff. He attributes the inefficacy of the *status quo* to the lack of legitimate definition. By this term, France has always intended to refer to the state of things which was in force in 1740, while the Greeks and Russia do not go farther back than the year 1757 in which the former changed the conditions by violence.

The provisions concerning the Holy Places enacted at the Berlin Congress were to be the legal foundation of the control of the Christian Sanctuaries which, various incidents notwithstanding, lasted until the end of the Ottoman Empire at the closing of the First World War.

On December 9, 1917, Allied troops under General Allenby, composed of British, French and Italian contingents, and some Jewish legionnaires, occupied Jerusalem. After 730 years of uninterrupted domination by Islam, the Holy Places were again guarded by soldiers of Christian states. Legally the transfer of sovereignty from Turkey became effective only seven years later, namely, with the coming into force of the Treaty of Lausanne.

The fate of the Holy Land, in case of its separation from the Ottoman Empire, had been the object of diplomatic negotiations during the years preceding its conquest by General Allenby. The so-called Sykes-Picot Accord of 1916 recognized the French interests in Syria. The "brown Zone", *i.e.* Palestine, was, however, to be separated from Syria and to be placed under an international regime. The only exceptions were the ports of Acre and Haifa, which were reserved to Great Britain. In the following year Italy acceded to this agreement at San Giovanni di Moriana, under terms of equality with France and the United Kingdom relative to the "brown Zone".

The collapse of the Ottoman Empire had brought about a situation comparable to that of the year 1099 when the Crusaders wrested the Holy Land from the infidels. The hopes of enthusiasts that the Holy Land would be given to Christianity again were soon disappointed. On November 2, 1917, the famous letter of Lord Balfour, British Secretary of Foreign Affairs, was written to Lord Rothschild for the Zionist organization, promising that the British Government would make every effort in favor of the establishment in Palestine of a "National Home" for the Jewish people. To this were indeed added the words, "it being clearly understood that

nothing should be done which might prejudice the civil and religious rights of existing non-Jewish Communities in Palestine . . . ".[26]

At the meeting of the Allied Supreme Council in San Remo (1920) Palestine was assigned to Great Britain. It was to become a mandate under article 22 of the Covenant of the League of Nations.[27]

The Preamble of the text of the Palestine mandate proclaimed the principal objects of the letter, as is customary in like diplomatic instruments. It referred expressly to the Balfour declaration and recognized " the historic connection of the Jewish people with Palestine ". No mention was made in the Preamble of the wishes of the indigenous population whose well-being and development was to form " a sacred trust of civilization ", according to Article 22 of the Covenant of the League. The historic importance of Palestine for Christianity, and also for the Mohammedan and Mosaic religions, was passed over in silence. Article 1 gave the Mandatory Power full rights in respect of the legislation and the administration in Palestine, in so far as this power was not limited by the provisions of the mandate. Likewise, the foreign affairs of Palestine were entrusted to the Mandatory (Art. 12). The Jewish Agency was recognized as a public body for the purpose of advising the administration of Palestine and of cooperating with it (Art. 4). Jewish immigration should be facilitated without prejudice to the other sections of the population (Art. 6).

[26] Royal Institute of International Affairs, Information Department Papers, No. 20, Great Britain and Palestine, 1915-1936 (London, New York: Oxford University Press, 1937), p. 14.

[27] The mandate was to be an " A-mandate ", according to par. 4 of the above-quoted article. It should consist in " the rendering of administrative advice and assistance by a Mandatory " until such time as the respective communities would be able " to stand alone ". The text of the Palestine mandate was worked out in 1919 with the advice of the Zionist organization. See Pierre Rondot, *La Palestine, Abrégé de droit public et privé* (Paris: Recueil Sirey, 1933), pp. 24 ff. For the text of the mandate see League of Nations, *Official Journal,* 3rd year, No. 8 (Part II), August 1922, pp. 1007-1012.

Of principal importance for the government of the Holy Places were Articles 13 and 14. The first of these articles conferred all responsibility in this connection upon the Mandatory. The latter succeeded, in virtue of this provision, to the prerogatives formerly exercised by the Sultan. In particular the Mandatory had to preserve the "existing rights", *i.e.* the *status quo,* and to secure full access to the religious buildings and sites as well as the free exercise of worship. Special immunity from interference was given to Moslem sacred shrines. Article 14 provided for a Commission which was to determine the rights of the different religious communities in Palestine and particularly those relating to the Holy Places. Such a function would have amounted to not less than the definition of the *status quo,* in the sense of Article 13, disputed among the religious communities through centuries. The Commission should have been appointed by the Mandatory Power in agreement with the Council of the League of Nations. The functions and the composition of this Commission formed an issue in three years' negotiations in which not only the Powers concerned but also the Holy See were involved. The Article was redrafted repeatedly. Lord Balfour proposed a plenary commission with an American Protestant as chairman and subcommissions for each of the large religious groups. The French and the Italians submitted their own proposals, each of them claiming the chairmanship, as far as the representation of the Catholics was concerned. Article 14, as it was eventually agreed upon in a formal compromise between the members of the Council of the League, was never implemented and the Commission was never constituted.[28]

Most noteworthy are the provisions of Article 8 of the former mandate by which the centuries-old protective rights of the Christian powers were suspended in Palestine. Accordingly, the privileges and immunities of foreigners, including

[28] See Collin, *ibid.,* pp. 130 ff.

the benefits of consular jurisdiction and protection as formerly enjoyed in the Ottoman Empire by Capitulation or usage were declared as "not . . . applicable" in Palestine. It was added, however, that these rights should "at the expiration of the mandate be immediately re-established in their entirety or with such modifications as may have been agreed upon between the Powers concerned". This was not to apply to Powers which had previously renounced these "privileges and immunities", as enjoyed in August 1914. The latter exception was aimed at Austria-Hungary and Germany.[29]

During the negotiations and conferences between the Powers which decided the fate of the Holy Places the Catholic Church could not remain a silent observer. The Custody of the Holy Land directed a Memorandum from Jerusalem to the Paris Peace Conference, requesting the restoration of the *status quo* of 1740. The request of the Custody was in accordance with

[29] The Sublime Porte had one-sidedly abolished the Capitulations, beginning October 1, 1914. During the years 1917 and 1918 the Central Powers then concluded treaties with their Turkish ally, concerning the rights of their respective subjects abiding in the territory of the other signatory state. These treaties were based on the principle of equality and reciprocity.—The Note from the Turkish Foreign Minister to the Ambassadors of the Powers in Constantinople, abolishing the Capitulations is reprinted in Nasim Sousa, *The Capitulatory Regime of Turkey* (Baltimore: Johns Hopkins University Press, 1933), pp. 328 ff. This Note deals with the commercial privileges and jurisdictional exemptions of foreigners but characteristically does not mention in any way the religious protectorates or the conditions of the Holy Places. See also Max Kunke, *Die Kapitulationen der Türkei* (Munich: J. Schweitzer, 1918), particularly pp. 147 ff. Jean A. Mazard, *Le régime des Capitulations en Turquie pendant la guerre de 1914* (Alger: Jean Gondot, 1938).—The continuation and but temporary suspension of the capitulatory rights in Palestine follows historic precedents to a certain extent, cases in which territories were detached from the Ottoman Empire during the 19th and 20th century and constituted new states, or parts of already existing states (Treaty of Berlin 1878, Art. 8 [Bulgaria], Art. 37 [Serbia], Art. 49 [Rumania]). In all these cases the existing rights of foreign powers were to be altered only with their consent. One-sided, but express, abolition of the protective rights of foreign powers and exemptions in favor of their subjects followed the occupation of Bosnia and Herzegovina by Austria-Hungary, authorized by Article 25 of the Treaty of Berlin, and the occupation of Cyprus by Great Britain (compare Liszt, *ibid.*, pp. 128 ff.).

the demand of Austria, Belgium, France, Sardinia and Spain, presented to the Ottoman Government on May 28, 1850.[30]

On March 10, 1919, Pope Benedict XV, in an allocution in the Sacred Consistory, expressed his anxiety because of the plan to create a privileged situation in favor of the Jews in Palestine and to deliver the august monuments of the Christian religion to non-Christians. In his consistorial allocution *Causa nobis* of June 13, 1921, Benedict XV declared himself for the safeguarding of the rights of the Catholic Church and of all Christians. Pope Pius XI renewed the demands of his predecessor in his allocution *Vehementer gratum,* made in the Sacred Consistory on December 11, 1922.[31]

In conformity with these solemn manifestations and warnings by the supreme authority of the Church was a Memorandum which Cardinal Gasparri, Papal Secretary of State, addressed to the Council of the League of Nations. In this Note, dated from the Vatican, June 4, 1922,[32] the Holy See declared that by no means did it oppose the decision already taken, by which the mandate over Palestine was entrusted to Great Britain. However, the Holy See demanded the modification of certain articles according to which firstly, the Jews were given a privileged and preponderant position; and secondly, the rights of the Christian denominations, in particular of the Catholics, were not sufficiently safeguarded. As to the first point, the subordination of the Catholics and of the native populations or religious denominations to another nationality or denomination was considered incompatible with the provisions concerning the mandate under Art. 22 of the Covenant of the League of Nations. Regarding the second point, particular attention was paid to the Commission which

30 To the Memorandum was added a list of Sanctuaries always possessed by the Custody of the Holy Land, and a list of the usurped Sanctuaries which were revindicated. See Collin, *ibid.,* pp. 122 ff., 200 ff. The Greeks answered with a Memorandum contesting the claims of the Franciscans, *ibid.,* pp. 206 ff.

31 Collin, *ibid.,* pp. 121, 132, 146.

32 *L'Osservatore Romano* (Rome), June 30, 1922. (Reprinted, Gassi, *ibid.,* pp. 340 ff.)

was to be established in accordance with Art. 14 of the text of the mandate submitted by Lord Balfour. The Cardinal Secretary of State declared the Holy See would never accept a right of the Commission to discuss the ownership of the Sanctuaries which for centuries and in their totality had remained peacefully in Catholic possession. Instead of the inter-denominational Commission the Holy See suggested a Commission composed of the Consuls in the Holy Land of the Powers which were represented in the Council of the League of Nations. The letter of Cardinal Gasparri had a partial effect, in as much as the draft of Art. 14, submitted by Lord Balfour, was replaced by another formula.[33]

The British Government organized the administration of Palestine on the basis of the mandate, and regulated the details of this organized administration by the Palestine-Order-in-Council of 1922/23.[34] In substance, Palestine was governed after the pattern of a British Crown Colony, with a High Commissioner holding full executive and legislative powers. A partly elected Legislative Council, which was provided for, was not constituted because of Arab non-cooperation. Turkish law remained in force where it was not amended by subsequent regulations. The High Commissioner had to act on the grounds of (Royal) Orders-in-Council, and of instructions given to him by the Colonial Secretary. In procedures before Courts the highest instance of appeal was the Judicial Committee of the Privy Council in London, as in other parts of the British Empire. Thus Palestine and the Holy Places enjoyed, whatever may have been the just reasons of complaint, the advantages flowing from the experience and skill of British colonial administration, and the benefits of government by law, very distinct from the past Turkish rule. A special Palestine Holy Places Order-in-Council of July 25, 1924,[35] provided that the High Commissioner was competent

[33] See above, p. 369.

[34] See Norman Bentvich, *Legislation of Palestine*, v. I, Orders-in-Council and Ordinances (Alexandria: Whitehead Morus Ltd., 1926), pp. 1 ff.

[35] *Ibid.*, pp. 30 ff.

to decide questions relative to the Holy Places, to the exclusion of the Palestine Courts.[36] A major incident occurred during the British administration before the Second World War, in August 1929. It led to bloody riots between Jews and Mohammedans and was caused by differences concerning the *status quo* at the Wailing Wall in Jerusalem where the Jews enjoyed a customary right to pray.

In a restrospective historic view the British mandate over Palestine[37] appears as a short interlude with a lifetime of only twenty-six years. Arab and Jewish nationalism proved to be dynamic forces that broke the form of the mandate. The resistance of the Arabs against increased Jewish immigration and the ensuing problems became the objects of a number of investigations by the British Government. One made by the Peel Commission in 1937 recommended the termination of the mandate and the partition of Palestine, with the creation of a Jewish state, the Arab part uniting with Transjordan. An enclave, including Jerusalem and Bethlehem, should remain under British mandatory administration. In 1945 President Truman sent a letter to Prime Minister Attlee, demanding the admission of 100,000 Jewish refugees to Palestine. A joint American-British Committee was subsequently appointed. It recommended, among other things, that, until further notice, Palestine should remain a mandate and then become a Trust Territory under the United Nations, guarding the rights of Christians, Jews and Mohammedans alike. The White Paper issued by the British Colonial Secretary in 1939 took into consideration the erection, within ten years, of an independent

[36] Arts. 2, 3.

[37] For the history of the British mandate in Palestine see especially: Royal Institute on International Affairs, Great Britain and Palestine, 1915-1936 (see above, n. 26); League of Nations, Permanent Mandates Commission, *Reports on Palestine,* 1923-; L. Larry Leonard, *The United Nations and Palestine,* International Conciliation, Carnegie Endowment for International Peace, October 1949, No. 454; Charles A. Gellner, *The Palestine Problem* (Library of Congress, Legislative Reference Service, Public Affairs Bulletin No. 50, Washington, 1947).

Palestine. Her government should be shared by Arabs and Jews.[38]

The Government of the United Kingdom found itself under the pressure exercised by the United States in favor of Jewish immigration. On the other hand, it had to regard its commitments towards the Arabs. From this dilemma it sought an outlet by resorting to the United Nations. On April 2, 1947, the British Government requested the Secretary General of the United Nations to convoke a special session of the General Assembly of this organization and to place the question of Palestine on the Assembly's agenda.[39] The General Assembly convened on April 28 and appointed a "Special Committee on Palestine" ("UNSCOP"). This Committee was instructed to investigate the question and to make recommendations for its settlement, giving "most careful consideration to the religious interests of Islam, Judaism and Christianity".

The UNSCOP consisted of representatives of Australia, Canada, Czecho-Slovakia, Guatemala, India, Iran, Netherlands, Peru, Sweden, Uruguay and Yugoslavia. It laid down its inquiries in a Report,[40] the majority recommending partition of Palestine, while the minority wanted to make it a federal state. Great Britain submitted its own report, while Saudi Arabia and Iraq proposed jointly to terminate the mandate and to recognize Palestine as an independent state. An *ad hoc* Committee was then appointed to prepare the Assembly's Resolution. Before this Committee the Jewish Agency opposed a special regime for Jerusalem and demanded the Jewish part of the city for the Jewish state. The Arab Higher Committee refused cooperation. The General Assembly, on

[38] See Leonard, *ibid.*, p. 755.

[39] In the sense of Art. 10 of the Charter of the United Nations. According to this article, the General Assembly may discuss any questions or any matters within the scope of the Charter and may make relative recommendations to the Members of the United Nations or to the Security Council or to both.

[40] Un. Nat. Doc. A/364.

November 29, 1947, passed a Resolution in favor of the partition plan.[41] In its Resolution [42] the General Assembly took note of Great Britain's intention to abandon the mandate and to evacuate Palestine by August 1, 1948. The Assembly recommended that two months after the departure of the British troops an Arab state, a Jewish state, and an internationalized City of Jerusalem should be established, all three parts linked by an economic union. A "United Nations Palestine Commission" was established to implement this Resolution and particularly to define the boundaries between the three areas. A Statute of the City of Jerusalem was to be prepared by the United Nations Trusteeship Council. The Security Council was called upon to take the measures necessary for the execution of the Partition Plan.[43]

[41] The plan was voted with 33 pro and 13 con, and 10 abstentions. Of the Great Powers, France, the Soviet Union, and the United States voted pro; China and the United Kingdom abstained. All states of the Soviet bloc voted pro; all Mohammedan states voted con. Of states with Catholic majorities of their populations, 18 voted pro, 2 con, 6 abstained.

[42] Un. Nat. Doc. A/516.

[43] The Security Council was requested in this Resolution to consider as a threat to peace especially any attempt to alter the Partition Plan by force. The reason for this request to the Security Council was that, while the General Assembly has under Art. 10 of the Charter (see above, n. 39) the right to *discuss* and to *make recommendations,* its respective resolutions lack binding force upon the Members of the United Nations. Only the *decisions* of the Security Council in accordance with the Charter must be accepted and carried out by the Members (Art. 25). Further, the Security Council alone has the legal means of taking enforcement action on behalf of the United Nations. Such an action must be based on a previous determination by the Security Council that a "threat to the peace, breach of the peace, or act of aggression" exists. The Security Council enjoys widest discretion in this determination as well as in the choice of the kind of enforcement measures to be subsequently applied. In the case of Palestine the General Assembly undertook to make indirectly enforceable its Resolution on the future government of that country, by proposing to the Security Council that it consider a threat to peace the violation by force of this Resolution. As to the kind of measures to be taken, the General Assembly limited its request to Arts. 39 and 41 of the Charter. These include particularly interruption of diplomatic relations and economic boycott, but exclude military measures (Art. 42). The Security Council is free to comply or not to comply with a request of the General Assembly. It could resolve on enforcement only by an affirmative

The Plan of Partition with Economic Union contained in the Resolution of the General Assembly provided for a Declaration to be made before independence to the United Nations by the provisional government of each proposed state. This Declaration should have possessed the force of a fundamental law of the respective state and should have given, *inter alia,* basic guarantees concerning the Holy Places, religious buildings and sites. The events have superseded this part of the Resolution in as much as a Jewish State has meanwhile come into existence and has been accepted as a Member to the United Nations, without having made this Declaration.[44]

The Partition Plan provides that the City of Jerusalem shall be established as a *corpus separatum* under a special international regime and shall be administered by the Trusteeship Council of the United Nations. The boundaries of this City were to include the present municipality of Jerusalem and its surrounding villages and townships. (The sketch map which is attached to the text of the Resolution also includes Bethlehem.) The Trusteeship Council was given certain directives as to the contents of the Statute which this Council had to work out.[45]

The Resolution of the General Assembly contained further an important provision by which the states which had enjoyed capitulatory rights in Palestine in the past, were invited to renounce them.[46] This "invitation" refers to the rights, suspended under the mandatory regime according to Art. 8 of

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vote of seven of its eleven members, including the concurrent votes of its permanent members (Art. 27, par. 3). The "veto" of one of the Great Powers would prevent any enforcement measure by the United Nations in Palestine.

[44] See below, p. 378.

[45] For the finished draft, see below, pp. 380 ff.

[46] "States whose nationals have enjoyed in Palestine the privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed in the Ottoman Empire are invited to renounce any right pertaining to them to the re-establishment of such privileges and immunities in the proposed Arab and Jewish States and the City of Jerusalem."—Compare above, pp. 369, 370.

the mandate. It concerns particularly the historic right of France to protect the Latin Christians in the Holy Land.

The United Nations Palestine Commission to which has been entrusted the task of carrying out the Partition Plan consists of representatives of Bolivia, Czecho-Slovakia, Denmark, Panama and the Philippines. The fight that beset Palestine soon afterwards prevented the Commission from fulfilling its task. The Jews proclaimed an independent State of Israel, when Great Britain relinquished the mandate on May 15, 1948, and began to withdraw her troops from Palestine. The next efforts of the United Nations General Assembly, which met in a second special session on April 16, 1948, and of the Security Council[47] were dedicated to bringing about the end of the hostilities between Arabs and Jews. The Assembly appointed, with a view to this, a Committee, consisting of China, France, the Soviet Union, the United Kingdom and the United States, which was to choose a Mediator for Palestine. (The choice fell on Count Folke Bernadotte from Sweden.) He was also to use his good offices to assure the protection of the Holy Places.[48] Various other proposals were submitted to the General Assembly concerning the protection of Jerusalem after the end of the mandate. France moved to organize immediately for this purpose an international police force of a thousand men. The United States proposed to establish a temporary trusteeship over Jerusalem. Only the appointment of a Special Municipal Commissioner was recommended to the Mandatory Power.[49] He (Mr. H. Evans) was appointed,[50] but never acted.

The third (ordinary) General Assembly established on December 11, 1948, a "United Nations Conciliation Commis-

[47] Un. Nat., General Assembly, Second Special Session, Official Records; Un. Nat. Security Council, Third Year, Official Records.

[48] Un. Nat. Doc. A/552.

[49] Un. Nat. Doc. A/545.

[50] General Assembly, Second Special Session, Official Records, p. 17.

sion", composed of three members (France, Turkey, and United States). It was authorized to assume any of the functions of the United Nations Mediator,[51] including, therefore, the protection of the Holy Places during the emergency. Besides, the United Nations Conciliation Commission was instructed to work out detailed proposals concerning a permanent international regime for Jerusalem and the protection of the Holy Places in the rest of Palestine. The factual situation in Palestine had, indeed, suffered a complete change. The State of Israel, which had come into being, was admitted as a member to the United Nations on May 12, 1949,[52] and was recognized by 54 states by September 1949.[53] The rest of Palestine had come mainly under the occupation of Transjordan. Jerusalem had become a principal theater of the war between Arabs and Jews. As a result of the armistices which were concluded [54] the old Walled City, including most of the Holy Places, is under the occupation of the Hashemite Kingdom of Jordan,[55] while the new City is held by Jewish troops. Under the changed circumstances the Arab governments stated before the Conciliation Commission [56] that they were willing to accept the internationalization of Jerusalem. The Israelis declared their willingness to agree to an international regime for, or the international control of the Holy Places in the City only, but not to accept an international regime for Jerusalem. The Conciliation Commission thought to adjust its recommendations to this situation and submitted a report to the Fourth General Assembly which abandoned the princi-

[51] After the assassination of Count Bernadotte, Dr. Bunche (U.S.A.) had taken over his work as Acting Mediator.

[52] Un. Nat. Doc. A/867.

[53] Leonard, *ibid.*, p. 725.

[54] Un. Nat. Doc. A/930.

[55] This region of Palestine was proclaimed a part of the Hashemite Kingdom of Jordan on April 24, 1950 (*New York Times*, April 25, 1950, pp. 1, 14; April 26, 1950, p. 21).

[56] Only Jordan's attitude contradicts this. See above, note 55.

ple of the creation of an internationalized *territory* of Jerusalem. Jerusalem was to be divided into two demilitarized and neutralized zones, one Arab and the other Jewish. A United Nations Commission for Jerusalem and a General Council taken from Arabs and Jews was to be established but the government functions not reserved to the Commissioner were to fall to the Jewish and Arab authorities, for their respective zones.[57]

The General Assembly, on December 9, 1949, did not accede to the report of its Conciliation Commission and confirmed the Resolution of the General Assembly of November 29, 1947,[58] according to which Jerusalem and the surrounding area should become an international city under the authority of the United Nations. In the same Resolution of December 9, 1949, the Assembly urged the Trusteeship Council to complete the Statute of Jerusalem, notwithstanding any diverting actions.[59]

The Trusteeship Council worked on the Statute during the following months. The President of this Council, Mr. Roger Garreau (France), proposed another solution which was aimed at appeasing the opposition of Israel and of Jordan. According to that plan, only an international area within Jerusalem would be established. It would include a small area within the City and small, scattered areas outside of it, comprising all the Holy Places covered by the *status quo* of 1757. A governor of the Holy Places would be appointed by the Trusteeship Council, an international police force would be organized, and a special court for the area would be erected. This plan,

[57] Un. Nat. Doc. A/927.

[58] The vote was taken with 38 pro to 14 con, and 6 abstentions: the United States voted con, reversing their position of Nov. 29, 1947, and were joined this time by Great Britain. On the other hand, the states of the Soviet bloc and the Mohammedan states, except Turkey, voted pro, the Mohammedan states, contrary to their attitudes of two years previous. Israel voted con. Of states with Catholic majorities of populations, 19 voted pro, 3 con, 4 abstained (compare above, n. 41).

[59] Un. Nat. Doc. A/1222.

of course, did not conform to the resolutions of the General Assembly in its sessions of 1947, 1948, and 1949. The Trusteeship Council finally approved a Statute which keeps within the limits of the General Assembly's recommendations to establish the whole area of Jerusalem as a *corpus separatum*. The Council, however, did not take prompt action for implementation of the Statute and called on Israel and Jordan for cooperation in putting the Statute into effect.[60]

The Statute repeats the general principles as set forth in the Resolution of the General Assembly of November 29, 1947. In addition to these, particularly the following provisions concerning the regime in general, appear noteworthy:

> The territorial integrity of the City and its " special regime " shall be assured by the United Nations. The City shall be, and remain, neutral and inviolable. It shall have no armed forces except as provided for by the Statute or allowed by the Security Council.
>
> All persons are entitled to enjoy human rights and fundamental freedoms as set forth in the Statute. Residents of the City become its citizens except those who exercise the right of option in favor of their former nationality.
>
> The Governor shall be appointed by and responsible to the Trusteeship Council. He shall be responsible for the organization and direction of the " special police force ", and particularly for the protection throughout the City of the Holy Places. He shall also conduct the external affairs of the City.
>
> Legislative power is vested in a Legislative Council, elected by the citizens. It consists of four colleges: Christian, Jewish, Moslem, and non-denominational. The Governor has a veto right under certain conditions against bills of the legislature and he may also legislate independently of it by order.
>
> A Supreme Court is to be erected, its judges are to be appointed by the Trusteeship Council. This Court has the power to void legislative or " official " acts because of incompatibility with the Statute. It also has competence in jurisdictional con-

[60] Un. Nat. Doc. T/592.

flicts between religious courts, or between religious courts and civil courts.

Freedom of entry into, of temporary residence in and of exit from the City shall be insured to all foreign pilgrims and visitors without distinction as to nationality or faith. Private or foreign educational establishments may be maintained in the City, provided that existing rights shall continue unimpaired.

As to the "Holy Places, Religious Buildings and Sites" (Art. 39), the principle of the *status quo* is confirmed again.

"Existing rights in respect of the Holy Places, Religious Buildings and Sites shall not be denied or impaired". On this basis and subject to the requirements of public order free access to the Sanctuaries and free exercise of worship therein, is maintained.

The Governor is the "Protector of the Holy Places" in the City. To ensure protection for the Holy Places in the Holy Land outside the City he shall negotiate agreements with the states concerned. [This provision leaves much to be desired as it virtually abandons the respective Sanctuaries to the good will of the Arab and Jewish partition-states.]

The Governor is directed to decide on the basis of the "existing rights" disputes arising between the religious communities. For the purpose of such decisions he may appoint a committee of inquiry. An appeal lies in such cases to the Supreme Court from decisions of the Governor on points of law.[61]

The Governor may arrange for repairs at the Holy Places if they are not carried out upon his call by the religious communities concerned.

* * * * *

During the past centuries Palestine had been, at any one period of history, under the domination of only one power; Romans, Arabs, Latins, Arabs again, and Turks succeeded each other in the sovereignty over the Holy Land. Whenever the rulers of Palestine made concessions to foreign states, in

[61] Different from Arts. 2, 3 , of the Holy Places Order-in-Council (see above, pp. 372, 373).

particular by Capitulations, concerning the access to, the worship at, or the possession of the Holy Places, these acts of the sovereign power were of contractual nature, or as the Sublime Porte interpreted them, unilateral, revocable grants.[62] The sovereign rights in the territory of Palestine were not affected by such obligations. When Great Britain was given the mandate over Palestine in 1922, its authority over the land was limited by Article 22 of the Covenant of the League of Nations and by the provisions of the mandate itself. Nevertheless, the authority over Palestine was exercised by *one* governmental organ, the High Commissioner, appointed by the King of England, and the inhabitants, as well as all worshippers, enjoyed legal security under the *pax britannica*.[63] The events of the year 1948 divided Palestine. Two sovereign powers have been established which meet each other in the City of Jerusalem. The existence of two sovereignties in Palestine is an accomplished fact, supported even by the Resolution of the General Assembly of November 29, 1947.

The question *de lege ferenda* concerning the Holy City is: should the territorial limits of the two jurisdictions be drawn at a line at the outskirts of Jerusalem, or are these frontiers between two antagonistic creeds, races and states to cut through the City close by the Sanctuaries of "the three great monotheistic faiths throughout the world"?[64] No kind of privileges or immunities, promised or granted by the two holders of sovereignty, no "functional"[65] international regime

[62] This theory was set forth, *e.g.*, in the note to the Powers abolishing the Capitulations (compare above, n. 29).

[63] For the widely discussed question as to who possessed sovereignty over a mandated territory, the Mandatory, the League of Nations, both of them, or the inhabitants, see Oppenheim-Lauterbach, *International Law* (6th ed.), v. I, p. 206, n. 1. Concerning the relations of formerly mandated areas to the United Nations see H. Duncan Hall, *Mandates, Dependencies and Trusteeships* (Carnegie Endowment for International Peace, Washington, 1948), pp. 271 ff.

[64] This phrase is taken from the text of the Resolution of the General Assembly of the United Nations, November 29, 1947.

[65] This expression was used by Mr. Sharett, Foreign Minister of Israel, before the Special Political Committee of the General Assembly, on November 25, 1949 (*New York Times*, November 26, 1949, p. 2).

at the Holy Places, would remove the dangers flowing from this situation. Certainly, the "territorial" internationalization, *i.e.* the establishment of a permanently neutralized zone, covering Jerusalem and its environs, is not an ideal solution either. Whatever guarantees may be attached to it, the neutrality of an internationalized Jerusalem may be violated in a future conflict between the two neighboring states. Similar infringements have occurred in numerous historic cases. However, when an international enclave of Jerusalem and its environs is established,[66] the chances of keeping a war aloof from the Holy Places will be much greater. Boundaries, sufficiently distant from the core of the Sanctuaries will form a *cordon sanitaire* against the excesses of nationalism. If they do not form a serious military obstacle against a well-equipped army, they will be a moral hindrance at least against aggression.

The finished draft of the Statute of Jerusalem provides that the Trusteeship Council "by virtue of the authority conferred upon it by General Assembly Resolutions . . . shall discharge the responsibilities of the United Nations" for the City (Art. 5). Whatever the legal grounds or advantages of this grant of authority may be, under the prevailing circumstances a grave injustice against the Catholics is involved in it. A considerable number of states which have Catholic majorities of populations and which maintain ancient Catholic traditions have not been admitted until now as members to the United Nations. Such states are: Austria, Ireland, Italy, Portugal, Spain. Likewise the German and the Swiss Catholics are unrepresented in the United Nations.

[66] Precedents in more recent times exist for the establishment of an international city under like conditions: that of Danzig provided for in the Treaty of Versailles (1919), which afforded a *modus vivendi* between Germany and Poland during the time between the two World Wars; and the solution attempted in the Peace Treaty of 1947 between the Allied Powers and Italy concerning Trieste, control of which city is disputed between the latter country and Yugoslavia. Of durable success proved to be the establishment in 1911, by the Powers concerned, of an international zone covering the city of Tangier, between the French and Spanish zones of Morocco.

The just demand for a share in the administration of Jerusalem by nations which, though not members of the United Nations, are religiously interested in the Holy Places, could be met under principal maintenance of the "special regime" under the authority of the United Nations. The Representatives of the Powers concerned, accredited in Jerusalem, members as well as non-members of the United Nations, could join in a permanent Administrative Council, at the side of the Governor of the City. This Council would have consultative functions, but also a right of complaint before the superior bodies of the United Nations, under defined conditions. A like solution would partly follow the line of the proposal made to the Council of the League of Nations by Cardinal Gasparri, in his Note of June 4, 1922.[67] Such an amendment of the present draft of the Statute would take into account that the United Nations are still far from representing the universality of the civilized nations, while the fate of the Holy Places is a matter of deepest concern of Christians, Jews and Mohammedans in the whole world. The Catholic Church particularly has sacred and ancient rights there. It would be a grave insult to many millions of Catholics if their legitimate representatives would be excluded from the protection of the Sanctuaries.

The greatest difficulty for carrying through the plan of a special international regime for Jerusalem is caused by the fact that the respective recommendations of the General Assembly of the United Nations are not legally binding upon the states. Neither Israel nor Jordan is willing at present to give up its respective occupation areas in the City. The request by the Assembly to the Security Council that the latter adopt those enforcement measures which it deems necessary [68] in order to implement that regime, must be considered as vain as long as the present inner paralysis of this body endures. What is left, is mainly the moral influence of the General

[67] See above, pp. 371, 372.

[68] See above, n. 43.

Assembly of the United Nations and the might of the governments participating in the solution of the Palestine problem, especially the might of the Great Powers.

It must be stressed, however, that the ancient right of protection by the Christian states, exercised in the Ottoman Empire and temporarily suspended under the mandate of 1922, was automatically revived on May 15, 1948, when this mandate ended.[69] The Resolution of the General Assembly of November 29, 1947, indirectly confirmed this, since it invited the Powers concerned to renounce their privileges. Pursuant to this, Art. 40 of the Statute provides:

> Foreign powers whose nationals have in the past enjoyed in the City the privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by capitulation or usage in the Ottoman Empire, are invited to renounce, if they have not already renounced, any right pertaining to them as regards the re-establishment of such privileges and immunities in the City. Any privileges and immunities which may be retained, shall be respected.

A renunciation of these rights of protection by the Christian Powers, particularly by the Powers, Signatories to the Treaty of Berlin of 1878,[70] would be equal to the abandonment of nearly the last remaining legal means of safeguarding the Sanctuaries of Christendom in an area which at present has not yet emerged from a state of war and which is filled with future dangerous tensions.[71] At least the Catholics of those countries which enjoy such historic rights of protection should

[69] See above, pp. 369, 370.

[70] See above, p. 366.

[71] In the General Assembly's Special Political Committee, Dr. Charles Malik (Lebanon) especially addressed France. He reminded her of her "historic rights and traditions in the Holy City acquired through centuries". "Are the Government and the people of France," he asked, "willing to face before future generations the charge that they avoided the solution by peaceful means of what generations of Frenchmen fought and died for in Palestine?" (*New York Times*, November 29, 1949, p. 49).

require their governments to maintain and to make the fullest possible use of their ancient rights, and should emphasize the fact that they consider a possible renunciation of the latter as valid only for a time and under conditions in which reliable and unequivocal guarantees for the security of the Holy Places will be established.

Before all, Catholics must demand that the admonitions and suggestions of the Holy See be duly regarded by the United Nations and its members. Pope Pius XII has repeatedly raised his voice, in the question of Jerusalem and the Holy Places, to exhort and to give authoritative guidance to the faithful. Shortly before the termination of the British Mandate, on May 1, 1948, the Holy Father, in his Encyclical Letter *Auspicia quaedam,* expressed his anxiety for the Holy Places, menaced with profanation in the war which already had broken out in Palestine.[72] On October 24, of the same year, the Pope, in his Encyclical *In multiplicibus,*[73] declared it to be very appropriate that in Jerusalem and its environs an international regime should be established, a regime which, under the actual circumstances, seems to be the most apt for the protection of the sacred monuments there. Again, on April 15, 1949, Pope Pius, in his Encyclical *Redemptoris nostri cruciatus,*[74] demanded a suitable juridical status for the Holy City, the stability of which, under present circumstances, can only be assured and guaranteed by a common understanding of the peace loving nations, duly mindful of the rights of others. Beyond this, the Holy Father said, it is necessary to provide for protection for the Holy Places, not only in Jerusalem and its neighborhood, but also in other cities and towns of Palestine. On November 8, 1949, in his Apostolic Exhortation *Sollemnibus documentis,*[75] the Pope called upon the

[72] *Acta Apostolicae Sedis,* XL (1948), 171.

[73] *Ibid.,* p. 433.

[74] *Acta Apostolicae Sedis,* XLI (1949), 161.

[75] *Ibid.,* p. 530.

faithful to pray fervently for a just order in Palestine which will preserve the integrity of the Holy Places.[76]

A resurgent Crusaders' spirit among Catholics will be able indeed to defend the rights of Christendom and to attain just and full guarantees, under international law, for the greatest Christian Sanctuaries.

PETER BERGER

THE CATHOLIC UNIVERSITY OF AMERICA

[76] Also see the Statement released by the Cardinals, Archbishops and Bishops of the American Hierarchy at their annual meeting in Washington, November 16-18, 1949 (*Catholic Action*, v. XXXI, nr. 12, Dec. 1949, p. 20).

"Atque utinam—quod fore confidimus impenseque optamus—Deipara Virgo Maria, immaculati sui Cordis bonitate permota, id a Divino Redemptore impetret, ut hac nova precum contentione eveniat ut quam primum Hierosolymae universaeque Palaestinae eiusmodi tribuatur ordinatio, quae ex verae iustitiae normis oriatur; quae reapse dimicationum ruinarumque discrimina prohibeat; quae loca illa, utpote sacra habenda, incolumia servet Iesu Christi sectatorum venerationi atque amori; cuius denique vi, iura omnia in tuto ponantur, quae Ecclesiae filii, tam incensa pietate, tam actuoso studio operosaque navitate per elapsi temporis spatium catholico orbi universo adepti sunt"—Pius XII, Adhortatio Apostolica, *Sollemnibus documentis*, 8 nov. 1949; *Acta Apostolicae Sedis*, XLI (1949), 530.

Cases and Studies

THE PROFESSION OF FAITH AND PREACHING

I have been invited to give a day of recollection to a group of priests belonging to a clerical exempt institute. I have the faculties to preach in my own diocese. But the house in which I am to conduct the day of recollection is in another diocese. Must I obtain faculties from the local Ordinary of the latter diocese? What about the renewal of the profession of faith?

ALIENUS

The superior designated by the constitutions of his institute can grant the faculties required for the preaching of sermons to his subjects, but not to nuns subject to him, provided the preacher has been tested and approved by his own Ordinary or superior.[1] In the usual case, the test is required before one's own Ordinary can grant this approval.[2] The fact that a priest has faculties in his own diocese should, therefore, satisfy the requirement that he

[1] Can. 1338, § 1. Si concio habenda sit tantum ad religiosos exemptos aliosve de quibus in can. 514, § 1, facultatem concionandi in religione clericali dat eorum Superior secundum constitutiones; qui in casu potest eam concedere etiam iis qui de clero saeculari vel de alia religione sunt, dummodo a proprio Ordinario vel Superiore fuerint idonei iudicati.

2. Si concio habenda sit ad alios, vel etiam ad moniales regularibus subiectas, facultatem religiosis quoque exemptis impertit Ordinarius loci in quo concio fiet; concionator autem, verba facturus monialibus exemptis, licentia Superioris regularis praeterea indiget.

Can. 514, § 1. In omni religione clericali ius et officium Superioribus est per se vel per alium aegrotum professis, novitiis, aliisve in religiosa domo diu noctuque degentibus causa famulatus aut educationis aut hospitii aut infirmae valetudinis, Eucharisticum Viaticum et extremam unctionem ministrandi.

[2] Can. 1340, § 1. Graviter onerata eorum conscientia, loci Ordinarius vel Superior religiosus facultatem vel licentiam concionandi cuiquam ne concedant, nisi prius constet de eius bonis moribus et de sufficienti doctrina per examen ad normam can. 877, § 1.

Can. 877, § 1. Tum locorum Ordinarii iurisdictionem, tum Superiores religiosi iurisdictionem aut licentiam audiendarum confessionum ne concedant, nisi iis qui idonei per examen reperti fuerint, nisi agatur de sacerdote cuius theologicam doctrinam aliunde compertam habeant.

enjoys the favorable judgment of his own Ordinary with regard to preaching.

The very possession of these faculties by a priest also indicates that he has made the profession of faith as required by canon 1406, § 1, 7°,[3] and that he has taken the oath against Modernism, as required by the motu proprio *Sacrorum antistitum*.[4] If this profession of faith, with its corresponding oath, had not been made, it would need to be made now in the presence of the religious superior[5] or, to obtain diocesan faculties, of the local Ordinary. Of course, the local Ordinary could delegate the religious superior for this function. But since the requirement has been already fulfilled, the profession of faith and the corresponding oath need not be repeated. For the Sacred Consistorial Congregation has declared that if a person has taken the oath against Modernism for the faculty of hearing confessions in one diocese, thus qualified, he need not repeat it when he seeks the faculties of another diocese.[6] There seems no solid reason for departing from the rule when the faculties are obtained not from another local Ordinary but from a religious Ordinary or when the faculties concern preaching rather than the confessional.

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[3] Can. 1406, § 1. Obligatione emittendi professionem fidei . . . tenentur: 7° Coram loci Ordinario eiusve delegato . . . sacerdotes confessionibus excipiendis destinati et sacri concionatores, antequam facultate donentur ea munia exercendi.

[4] Pius X, motu propr. *Sacrorum antistitum*, 1 sept. 1910—*Fontes*, n. 689.

[5] The Sacred Consistorial Congregation indicated in 1910 that religious should take the oath against Modernism in the presence of the person from whom they received the faculties to preach or to hear confessions—cf. resp. 17 dec. 1910—*AAS*, III (1911), 25. There seems no reason to depart from this rule in the case of those who are not religious or in the case of the profession of faith; cf. Fanfani, *De Iure Religiosorum* (Taurini-Romae: Marietti, 1925), p. 136, n. 123; Schaefer, *De Religiosis ad Normam Codicis Iuris Canonici* (Romae: Typis Polyglottis Vaticanis, 1947), n. 1229; Blat, *Commentarium Textus Codicis Iuris Canonici*, III, pars II, (2. ed., Romae: Collegio "Angelico", 1934), p. 425; Coronata, *Institutiones Iuris Canonici*, II (2. ed., Taurini-Romae: Marietti, 1939), n. 970.

[6] S.C. Consist., 20 iun. 1913—*AAS*, V (1913), 272. In 1910 the same Sacred Congregation had declared that when temporary faculties are renewed, the renewal of the oath against Modernism is not necessary; 25 oct. 1910—*AAS*, II (1910), 856.

FACULTIES FOR A LECTURE

I have been invited to give a lecture on marriage in another diocese. The lecture will be delivered to a group of college students in the auditorium of the college. I have asked the head of the college whether he has obtained the faculties of the diocese for me. He replies that my talk is not a sermon and that therefore I do not need faculties. Is this conclusion justified?

AULADICENS

The canonical mission seems necessary when one possessing the sacred orders required for preaching gives a catechetical instruction publicly, as in a church or in place of a sermon, since under such circumstances it seems correct to say that the cleric is partaking in the apostolic ministry of preaching.[1] On the other hand, the Code is silent in regard to the canonical mission in reference to professors in seminaries.[2] The analogy between the seminary instructor's post and that of the lecturer in the present case is rather notable. It might be said that the local Ordinary, even though he is not required to give a canonical mission to the former, is nevertheless in complete control of a seminary. Even this is not true in the case of a seminary conducted by religious or even by a society without vows.

It seems safe to conclude that the lecture on marriage is not a public act of catechizing, even though it contains the elements of Christian doctrine, but that it is, under the circumstances, a talk given to a restricted and private group, even though the numbers involved are in excess of those attending an ordinary classroom

[1] Cf. Allgeier, *The Canonical Obligation of Preaching in Parish Churches*, The Catholic University of America Canon Law Studies, n. 291 (Washington, D. C.: The Catholic University of America Press, 1949), p. 35.

[2] Cf. cann. 1366, 1367, where the qualifications of the seminary faculty are specified, as well as the requisite spiritual exercises for the seminarians. Many have held that even Sisters need the canonical mission for giving catechetical instruction in the schools; it is difficult to see how they can assign to non-clerics an exercise of an apostolic function; cf. Coronata, *Institutiones Iuris Canonici* (ed. altera, 5 vols., Taurini: Marietti, 1939-1946), II, 251, nota 8.

Article 21, 5°, of the Constitution, *Deus scientiarum Dominus* (24 maii 1931—*AAS*, XXIII [1931], 241) speaks of the "canonica missio docendi" given the professors by the Chancellor of Pontifical Universities, but this seems synonymous with "official appointment"; it seems clear that this appointment is needed even by those who have diocesan faculties to preach and, on the other hand, that it does not take the place of the latter.

lecture. On the other hand, the law seems to demand at least the presumed assent of the diocesan authorities (cf. canon 1381).

FACULTIES FOR RETREAT CONFERENCES

In a retreat which I am to give to a group of boarding students at a college conducted by a clerical exempt institute, all the conferences will be given in the school auditorium and none in the chapel. I have the faculties to preach in my own diocese. But the school at which I shall give the conferences is in another diocese. Must I obtain the faculties from the local Ordinary of the latter diocese?

CIRCUMLOQUENS

A retreat conference should be regarded as an exercise of preaching even though it is not given in a chapel. Therefore, if this retreat were to be given at a school conducted by a non-exempt institute, the faculties of the local Ordinary would be needed. On the other hand, the appropriate superior in an exempt clerical institute is competent to give the faculties required for a retreat given students who board at a house subject to him.[1]

PREACHING FACULTIES GRANTED BY A DELEGATE

I was passing through a town on a Sunday morning and stopped at a nearby church to celebrate Mass. I was well known to the pastor and he asked me to say a few words to the congregation at the Mass I celebrated. When I objected that I did not have the faculties of the diocese, he told me that he gave them to me. Is it possible that he could do so?

PAUCIS VERBIS

The use of epikeia in such a case seems not warranted.[1] The strictness of *The Norms for Sacred Preaching*,[2] although they do

[1] Cf. can. 1338, §§ 1, 2; can. 514, § 1.

[1] Cf. MacCarthy, "The New Regulations on Preaching"—*The Ecclesiastical Review*, LVII (1917), 383, n. 8.

[2] S.C. Consist., decr. *Ut quae*, 28 iun. 1917, nn. 14-16—*AAS*, IX (1917), 328; Bouscaren, *The Canon Law Digest*, I (Milwaukee: Bruce, 1934), 626.

not require an examination of the preacher if the local Ordinary has certain knowledge of the candidate's qualifications from other sources, seems definitely to rule out a lax view of the desire of the legislator to insure that only qualified preachers be authorized to speak.

On the other hand, the faculties of not a few dioceses in the United States authorize priests to transmit the necessary canonical mission to extradiocesan priests, provided that the former are fully aware of the qualifications of the latter.[3] Perhaps the pastor involved enjoyed such authorization.

In any event, the obligation of preaching at the Mass is the pastor's, not the visiting priest's. If the latter takes over the pastor's function, he does so as a matter of courtesy.[4]

[3] Cf. Snee-Clark, "Synthesis of the Diocesan Faculties in the United States"—*Theological Studies,* IX (1948), 376, 377.

[4] Cf. "Sermon by Visiting Priest at Sunday Mass"—*The Jurist,* X (1950), 185.

THE CANON LAW SOCIETY OF AMERICA

A well-attended Spring Meeting of the Eastern Regional Conference was held at Hotel Barclay, Philadelphia, May 9. At the afternoon session the topic of the paper was "Discussions with Non-Catholics", prepared and read by Rev. Stephen J. Kelleher, S.T.L., J.C.D. A correlative topic was the subject of the paper read at the evening session by Rev. Ignatius Szal, J.C.D., "Communication of Catholics with Schismatics".

The Midwest Regional Conference has scheduled its annual meeting for the Morton House, Grand Rapids, Michigan, September 13-14, 1950.

Rt. Rev. Msgr. H. L. Motry, S.T.D., J.C.D., Dean of the School of Canon Law of The Catholic University of America and charter member of the Society, has been honored with the grant of the Papal Medal *Benemerenti,* it was announced at the 61st annual commencement of The Catholic University of America. The medal will be conferred in the Fall on him and on the other members of the Faculty who received it in recognition of a quarter of a century of service on the teaching staff of the University.

Decrees and Decisions

CANONICAL

FORBIDDEN TRADING

By a decree of March 22, 1950, the Sacred Congregation of the Council imposes the censure of specially reserved excommunication by anticipatory sentence (*latae sententiae*) on clerics, religious, quasi-religious, and members of secular institutes who violate the prohibition of canon 142 even by dealing in money. In appropriate cases, it requires the penalty of degradation. It also provides for the punishment of negligent superiors through the penalty of disqualification for all offices involving government or administration.

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CONGREGATIONAL SINGING

On May 25, at the opening of the International Congress of Sacred Music at the Pontifical Institute of Sacred Music in Rome, a directive was received from the Sacred Congregation of Seminaries and Universities in favor of congregational singing and the teaching of liturgical chant and popular hymns in parochial schools. The directive also charged bishops and priests with the moral obligation of contributing to the maintenance and the development of the Pontifical Institute of Sacred Music. It further recommended a careful study of the music of the Oriental Church and pointed to the fact that Gregorian Chant has many elements of Eastern Rite music.

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EXCOMMUNICATUS VITANDUS

By a decree of the Supreme Sacred Congregation of the Holy Office the censure of excommunication involving ecclesiastical ostracism was imposed on Rev. Andrew Agotha, a Romanian priest of the Latin Rite, the leader of a group of priests who, influenced by the communists, have tried, publicly and privately, to lead the

clergy and the laity away from due subjection to their lawful pastors and especially to the Roman Pontiff. His followers have been threatened with the same penalty if they continue favoring the schismatic movement.

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PATRON OF TEACHERS

On May 15, Pope Pius XII made St. John Baptist de la Salle the Patron of teachers and student teachers.

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CANONIZATIONS

The following Saints have been raised to the honors of the altar: April 23, St. Marie Emilie de Rodat; May 7, St. Antonio Maria Claret; May 18, St. Bartolmea Capitanio and St. Vincenza Gerosa; May 28, St. Jeanne of Valois; June 11, St. Vincenzo Maria Strambi; and June 25, St. Maria Goretti.

SECULAR

GOD'S PLACE IN DECLARATION OF HUMAN RIGHTS

The Ethics and Juridical Institutions Committees of the Catholic Association for International Peace have urged the United Nations Commission on Human Rights to give explicit recognition to God instead of the implicit recognition given a Superior Being in some phrases used in the draft covenant.

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MEDICAL CONDEMNATION OF EUTHANASIA

The Convention of the World Medical Association meeting in Copenhagen condemned euthanasia under any circumstances. The Convention represented 500,000 physicians and national medical societies of forty nations. Euthanasia is opposed to the Code of the Association formally adopted at Geneva.

PRESIDENTIAL ENVOY TO THE VATICAN

By a vote of 60-48, the Massachusetts Universalist Convention rejected a resolution opposing diplomatic representation of the United States at the Vatican. On the other hand, a Philadelphia Methodist Conference defeated a motion endorsing the sending of a presidential envoy to the Vatican and to the World Council of Churches in Geneva.

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FEDERAL AID TO EDUCATION

The Education and Labor Committee of the House of Representatives, after a month of daily meetings, by the middle of March had rejected four amendments affecting federal aid to education. By a vote of 16-9, it rejected an amendment that would have guaranteed bus ride aid for non-public school children in all States; by a vote of 21-3, an amendment that would have limited States to spending federal aid money for public schools; by a vote of 19-4, an amendment that would have accomplished the latter result through the indirect ruse of defining a "school" as meaning only a "public school"; and by a vote of 14-10, an amendment that would have specified that at least seventy-five per cent of federal aid funds should be devoted to raising the salaries of teachers in public schools.

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PHILIPPINE CLAIMS

Religious organizations that operated in the Philippines between December 6, 1941, and August 15, 1945, and that were affiliated with organizations in the United States may, before March 1, 1951, file claims with the United States Government under Section 7 of the War Claims Act of 1948 for expenditures made in providing food, clothing, hospitalization, medical service, or other relief to members of the armed forces or to American civilians whose claims are also recognized under the Act.

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PREACHING LICENSE

The State Court of Appeals of New York has upheld the conviction of a self-proclaimed Baptist minister for preaching without a

permit after the revocation of a previously held permit entitling him to preach in public places. The revocation was made on the grounds that he ridiculed religion and that his meetings caused disorder.

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COMMUNIST SCHOOL TEACHERS?

Eight public school teachers in New York City have been suspended by the Superintendent of Schools because of their refusal to answer questions regarding their alleged membership in the communist party.

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RELIGIOUS USE OF PUBLIC SCHOOLS

The school board of Allentown, Pennsylvania, has decided that all public school property in the city is available to any and all groups of individuals for after-school use.

The school board of Grand Rapids, Michigan, overruling a standing regulation, has approved the renting of a public school auditorium to a local church for Sunday services.

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EXCLUSION OF CLERGYMEN AS COURT AUXILIARIES

The Supreme Court of Illinois has ruled that the use of clergymen by divorce courts in effecting the reconciliation of estranged couples is unconstitutional under the McCollum decision of the Supreme Court of the United States.

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EXCLUSION OF CLERGYMEN FROM OFFICE

In Tennessee an ordained Baptist minister was forced to withdraw from his campaign for the Republican nomination for the State House of Representatives when it was pointed out that ministers and priests are ineligible for membership in either house.

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BIBLE-READING

A parents' suit against the Borough of Hawthorne, New Jersey, to prevent Bible-reading in the public school has been appealed

from the adverse decision of the court of first instance. The Bible-reading is required under a State statute providing that teachers shall read without comment five verses from the Old Testament each day of the school year. The statute permits the dismissal of any child from attendance at this reading at the request of his parents.

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BIBLE CLASS

The Attorney General of North Carolina has advised a group seeking the restoration of a Bible class to a high school curriculum, stating that the laws of the State do not prohibit such a class and pointing out that the State Board of Education leaves the question to the local school trustees. The course involved had been dropped after the McCollum decision.

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DISTRIBUTION OF BIBLES TO SCHOOL CHILDREN

The State Board of Education of Connecticut has referred back to the board of education of Rocky Hill a protest of Catholics against the distribution of Protestant version Bibles to public school pupils by the Gideon Society.

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TRANSPORTATION

The Governor of Massachusetts has signed the Sears-Rugg bill nullifying a Protestant-sponsored petition seeking repeal of the 1936 law allowing the free transportation of parochial school children to their schools at public expense.

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AIDING THE SICK, NON-SECTARIAN

By a vote of 4-2, the Supreme Court of Mississippi has held that the State Auditor must honor a warrant for the payment of an architect's fee for work done in behalf of the Mercy Hospital-Street Memorial. The majority opinion held that " administering to the sick is not sectarian ". The hospital had amended its charter so as to make it a non-profit institution. The court opinion further held that the aid would not be a donation or a gratuity in contravention of a constitutional prohibition.

PROPERTY-OWNERS' ALOOFNESS

In permitting the founding of a Poor Clare Colettine Monastery, the Board of Supervisors of Santa Clara County, California, has sustained a decision of a Planning Commission over the objection of land-owners who alleged the threat of a depression of real estate values as the reason for their opposition.

The Spokane City Council has approved an application made by diocesan authorities for a building permit authorizing the building of a church and a school in a neighborhood area. It has thus sustained a ruling of the City Planning Commission, against which residents in the area appealed because of the restriction of their personal liberties involved in the resulting noise, especially that attendant on weddings and funerals, and in the limitation of their freedom to go about in sun suits. Traffic hazards and traffic congestion were also offered as reasons to substantiate their opposition.

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NEGRO STUDENTS IN LOUISVILLE

A recent amendment of the Day Act of 1904, an Act which enforced rigid segregation under penalty of $1,000.00 minimum fine or $100.00 a day maximum fine, now provides that institutions of higher learning in Kentucky may accept negro students if the school's governing authorities decide to do so and if an equal, complete, and accredited course is not available for students at the Kentucky State College for Negroes. At the latter institution, religion and scholastic philosophy are not completely available. Therefore, Nazareth, Ursuline and Bellarmine Colleges in Louisville, all Catholic colleges, have decided to admit negro students.

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RECOGNITION OF GOD IN INDIA'S PARLIAMENT

The oath taken by members of India's first Parliament after two minutes of silence for prayer said: " I, having been elected a member of Parliament, do swear in the Name of God and solemnly affirm that I will bear true faith and allegiance to the Constitution of India ".

JAPANESE PLANNED PARENTHOOD

The *Japan Planned Parenthood Quarterly* is now available to the public with the permission of the Allied Occupation Headquarters. Mrs. Margaret Sanger is listed among its sponsors and contributors. It is the organ of the Birth Control Institute organized in 1947.

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IMMORALITY IN GERMAN PRESS

Die Neue Zeitung, an American-sponsored newspaper published in Munich, Frankfurt and Berlin directly under the Public Affairs Office of the High Commissioner of the United States, strongly supports those who are opposed to any curb on immorality in the press or in periodicals.

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AMERICAN OPPOSITION TO BAVARIAN PAROCHIAL SCHOOLS

Article 135 of the Bavarian Constitution provides that parents have the right to choose the type of schooling they desire for their children, and that the schools can be either confessional or non-denominational. An American Public Affairs official criticized this provision because it did not sufficiently meet the needs of parents who do not belong to any of the Christian churches and because it expressed favoritism for the confessional schools. Seventy-four per cent of the children attending schools are Catholic and twenty-five per cent, Protestant. The official was thus gravely concerned about the one per cent. In a letter to the High Commissioner, the Bavarian Hierarchy called the criticism an insult to the Pope because of the requirement of the Concordat underlying the provision which was criticized. The Hierarchy recalled the fact that the Concordat is an international document. It asked whether the Hitler pattern was to be followed in restrictions placed on confessional schools and in contempt for the right of parents to educate their children as they desire.

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REMOVAL OF ITALIAN COMMUNIST DEPUTY

The Italian Chamber of Deputies has paved the way for legal action against the communist deputy, Laura Diaz, who made offensive remarks about the Pope, by removing her parliamentary immunity by a vote of 254-132.

SYNAGOGUE AND STATE IN ISRAELI

A report made to the Rabbinical Assembly of America, meeting in New York, stated that through a religious bloc in the Israeli government spokesmen for Judaism are using political action to strengthen their cause and have won the following concessions: the invalidation of civil marriage; a separate religious school system; and the sole jurisdiction of religious courts in such matters as divorce and inheritance.

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SCHOOL TAXES IN BRITISH COLUMBIA

A delegation of Catholic laymen in British Columbia have presented a petition to the government asking exemption of the Catholic minority from taxes for public school support, since Catholic schools save the Province a million dollars a year. It also asked for the exemption of parochial schools from land taxation and for the extension of ordinary medical and dental services to children in the parochial schools.

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CULTURAL EXHIBIT OF UNESCO

The Canadian Catholic Conference has asked the government to refuse acceptance of the cultural exhibit organized by the United Nations Educational, Scientific and Cultural Organization because of its intellectualistic rationalism, its complete indifference to the Divinity, its failure to mention the Bible, and its practical disregard for specifically Christian cultural contributions over a period of twenty centuries.

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FRENCH ATTITUDE TO PAROCHIAL SCHOOLS

Three Departments of Brittany have voted approximately $505,000 to be distributed in the form of grants to students or their families without regard to their attendance at Catholic or at public schools. On the other hand, at the insistence of the Prefect of the Department, a government decree has annulled a grant of $750.00 made by the Council of the Department of Alps Maritimes for distribution to needy families that wish to send their children to Catholic schools. The action was taken as a result of the protest

of the State School Teachers' Union, which is opposed to the continuance of the Church schools.

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AUSTRIAN CONCORDAT

The Holy See considers that the Austrian Concordat was only interrupted during the years 1938-1945, a point recently emphasized by the Papal Internuncio to that country.

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POLISH PACT

After an extraordinary meeting of the Polish Bishops under the presidency of Archbishop Stefan Wyszynski, Primate of Poland, held April 22, they issued a statement regarding the pact made with the government. They said that the pact guarantees freedom for the operation of the remaining schools and for the active exercise of the ministry on the part of priests and religious and that it acknowledges the Pope as the Supreme Church authority in matters of faith, morals, and jurisdiction. The Church, the statement noted, has promised to urge respect for law and authority, to work for the welfare of the country, and to promote national and world peace.

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PRAGUE PROGRAM

Monsignor Ottavio de Liva, *charge d'affaires* of the Nunciature in Prague, left the city March 18 by plane. He had been given three days to leave on the ground that he had abused his diplomatic mission. Monsignor Gennaro Verolino left the country last July under a barrage of propaganda attacks. The Papal Nuncio, Archbishop Xavier Ritter, has been in Italy on sick leave since February 1949. The Czecho-Slovak legation to the Holy See has been closed and the *charge d'affaires* has departed. Yugoslavia's *charge d'affaires* is still resident there, but no other Soviet satellite nation now maintains diplomatic representation at the Vatican.

Members of the hierarchy are virtual prisoners in their residences in Czecho-Slovakia. An average of a priest a day is maintained in the arrests made by the authorities. A window display has been made of the trial of ten of them for treason. On April 13, religious were herded at night from their own monasteries into a few established by the government as concentration monasteries.

A commissar appointed by the government has been installed in the chancery offices of all the Czecho-Slovak dioceses. Separation of church and state by absorption of the former by the latter is patently the aim of the government, since the commissar's authority is predominant. Not only does he issue orders in the name of the bishop, using chancery stationery and seals, but his signature on documents issuing from the chanceries is so necessary that, without it, they are regarded as invalid by the government.

Since June 19, 1949, Archbishop Josef Beran has been under house arrest and now the same fate has visited Bishops Ambrose Lazik of Tirnava and Josef Carsky of Kosice. In the residence of Archbishop Beran, the police act as doormen, excluding unapproved visitors and exercising a comprehensive censorship of the Archbishop's mail. Archbishop Josef Matocha of Olomouc enjoys the enforced company of a policeman " for his own protection " on all his travels. The police surveillance exercised over the residences of the bishops extends also to those of diocesan deans, pastors, and religious.

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UKRAINE CHURCH LIQUIDATED

The Vatican Radio has reported that the Greek Catholic Church in the Carpathian Ukraine has been completely liquidated, the fourth Catholic section of territories annexed by Soviet Russia since the war to meet this fate. Seven of the eight bishops of that territory have been sent to Siberia and two have died as prisoners. All priests and laymen who professed their faith have been imprisoned or deported. During the ceremony attending the installation of a puppet schismatic prelate, an official proclamation introduced the Russian Orthodox religion and declared that thereafter the Greek Catholic Church would not be recognized.

Book Reviews

KIRCHENRECHT begründet von Eduard Eichmann neu bearbeitet von Klaus Mörsdorf. II Band, Sachenrecht. Völlig veränderte sechste Auflage. Verlag Ferdinand Schöningh, Paderborn, 1950. S. 504. Preis geb. 18 M.

This second volume of the new edition of the standard German commentary on Canon Law contains the Law on Things. The commentary is rather evenly divided although several parts, e.g., Indulgences and Extreme Unction, are too briefly expounded.

Some of the best parts of this book are devoted to adequate exposition of irregularities and impediments to Sacred Orders and to impediments to Marriage. Reference to civil law is also made in the latter item.

Several interesting topics are discussed such as who pays for the needed repairs of a church and the use of school halls, etc., when a church is not available. Oratories are discussed with some attempt to indicate when Holy Mass cannot be celebrated in a private oratory.

The footnotes to this second volume are mostly in Latin and German. No bibliography is provided and no index. A remark the reviewer made in connection with the first volume can be repeated. When volumes are offered for sale separately, an individual index should be provided. It is a pleasure to note here that Fanfani's first volume in Moral Theology does provide a separate index.

KIRCHLICHE EHEPROZESSORDNUNG von D. Dr. Joseph Wenner. Verlag Ferdinand Schöningh, Paderborn, 1950. Zweite vermehrte Auflage. Preis kart. 5.20, geb. 6.80. S. 288.

This compact volume contains the various instructions and decisions regarding the processes of nullity and inconsummation of marriage. A bounty of footnotes illustrates these documents. Some but very brief commentary is offered.

Perhaps the best advantage of Dr. Wenner's book is the com-

parative text of the law of the Code and the law of the Oriental Church in regard to marriage. The canons of the two laws are compared in such a way that the divergent texts, where they exist, are readily seen.

The bibliography is not too impressive but it is serviceable. What English books are mentioned are mostly canonical dissertations. The index is satisfactory.

RÖMISCHE RECHTSGESCHICHTE UND RÖMISCHES ZIVILPROZESSRECHT von Erwin Seidl. Wissenschlaftiche Verlagsonstalt K.G., Hannover, 1949. S. 140.

There is no doubt at all that a knowledge of Roman Law is of immense advantage in the study of Canon Law. This is a practical point which cannot always be achieved because of the comparative scarcity of suitable books. The book reviewed here would admirably fit the desired purpose. Where the German language is unknown, professors and lecturers in Canon Law could with profit to the student translate a generous summary of this concise history of Roman Law.

The author introduces his subject with various observations the most important of which is the influence of Roman Law in relation to modern jurisprudence.

Next, there is a consideration of Roman Law in its origin and development. Naturally, unequal parts are devoted to this arrangement. The classical period is sufficiently considered and adequate place is given to the law of Justinian and its subsequent diffusion. Not much bibliography is indicated but every section closes with a short reading list. These lists are representative and can be profitably consulted.

The author closes his book with a brief history of processes in Roman Law. This section is as succinct as the preceding parts but enough indication is given to explain the various elements which enter into and complete civil processes. What bibliography is offered here is placed at the beginning of the entire section and it is not as illustrative as found in the preceding sections.

The appendices are of more than ordinary value. First, there

is a list of significant years in the development of Roman Law from 3000 B.C. to 1453 A.D. Then a list is given of the jurists cited in the Digest. Some students may learn for the first time that the law was expounded by jurists other than Gaius, Modestinus and Ulpianus. Two excellent indices are provided. One specifically refers to laws and works considered in the construction of the author's history; the other is a topical index. The latter is as detailed as one could wish.

UNDER GOD AND LAW. Papers read to the Thomas More Society of London. Second series. Edited by Richard O'Sullivan. Newman Press, Westminster, Md. Pp. xxviii-171. Price $2.50.

This book contains ten instructive papers. Various points of Theology, history and political power are considered. Every one of these papers is written by an expert and every one should be thoughtfully read. Every one, too, deserves attention in a review and only the inexorable barrier of lack of space prevents adequate consideration. Hence, a choice must be made reluctantly.

The reviewer finds that the introduction of Richard O'Sullivan, K.C., is most interesting. It is entitled "The Christian Spirit of the Common Law". This basic concept is treated in connection with the trial and execution of St. Thomas More. It brings out in detail the attitude of the saint toward the new legal measures in England running counter to the accepted theory, practice and belief of the universal Church. That the saint was the "King's good servant" is abundantly clear in history but his resistance to purely human law when in conflict with a higher duty needs to be stressed. It is on this point that his martyrdom is understood.

"Law and Political Power" is a title of a paper contributed by J. F. Rogers, S.J. This paper admirably considers whether the State can be limited by law. Various theories of the authority of the State are expounded. There is a good analysis of the Soviet State in this matter. No less interesting is the review of the law of the Roman State particularly since the concept of a living person, called the State, and, acting as a physical person, continued through the French revolution.

A general outline of the traditional Christian doctrine on the

power of the State concludes this paper. Here the doctrine of St. Thomas of Aquin is stated indicating what the function of the State is, how it can accomplish its purpose and what the duties of the citizen are in regard to law. There is no hesitation in this paper in quoting the doctrine of St. Thomas of Aquin in regard to resisting unjust and inequitable enactments.

Two essays consider the position of the Church in the world today. These are entitled: " Church and State in the East ", and " Church and State in the West ". These essays should be read at the same sitting for the comparisons and contrasts should be learned at the same time. The concept of a separate religious society as it is known in the West is not the compelling idea in the East. It is essential to know this especially in view of the frequent amalgamation of religious and political societies in countries where the Orthodox Churches held sway. The current attempt in some other countries to secure such amalgamation is but the extension of the rule of secular authority over national religious bodies.

It is to be regretted again that further consideration of these excellent essays cannot be made. It is, however, the hope of the reviewer that this book may obtain a wide reception. A later series of papers is eagerly awaited.

LIVING LAW OF DEMOCRATIC SOCIETY by Jerome Hall. The Bobbs-Merrill Company, Inc., Indianapolis, Ind. Pp. 146.

There are three parts to this book, originally lectures and now revised as essays. The general theme is a consideration of positive law and Legal Positivism as a contribution to legal philosophy. The term " positive law " is clear enough for students of Canon Law but its exact meaning as found in this book is not the same as its use in Canon Law. This must be kept in mind constantly as one reads these essays.

The first part of this book is an essay entitled " Law and Legal Method ". It is a careful inquiry into the nature of positive law. This proceeds with a discussion of the various definitions of law and with a determination to remove wherever possible the confusion which exists between the concepts of positive law and law itself. The author has some serious but deserved criticisms to make regarding those who select a line here and there from earlier writers

and present these texts as indicative of opinions. He rightly insists on the necessity of weighing all the context of a work before even attempting to form an estimate of a writer's thoughts. In this essay, too, is found a really workable distinction between substantive and procedural law.

The second essay is called " Law as Valuation ". This is a particularly fine analysis of law with special reference to man as a rational being. The method used to develop this analysis is a comparison of the prevailing theories of law.

The author considers in detail the attacks on Natural Law especially the views of Hobbes, Hume and Bentham. All that eventually came to be known as Legal Positivism is expressed in detail and there is no doubt that the author disagrees with the basic tenets of this theory of law. Stressed in the development of legal concepts is the increasing moral experience of the human race. Examples can be cited of the laws relating to fraud and the decreasing compass of capital punishment.

In this second essay, the author weighs the meaning of the clause " consent of the governed ". He shows that due to the absence of class distinctions in democratic societies, as we have them today, the clause has a different meaning now than it had in Athens and Rome where such distinctions were found. In democratic societies today, the citizens govern themselves through their representatives but, as the author points out, this does not mean approbation of laws. The majority will rule and all obey the laws even minorities who do not approve of the laws as enacted.

Another point stressed in this essay is the necessity of knowing what terms mean in the different nations, cultures and systems of law. The author mentions some errors which would be amusing if they did not lead to such sad misunderstanding.

The third essay entitled, " Law as a Cultural Fact ", is a delineation of the use of law in one's daily life and pursuits. People are not always conscious of this fact and it is well to see this item the subject of extended discussion.

The over-all estimate of Dr. Hall's essays must include some feeling of gratitude for he has shown how really untenable in the light of history and culture is the theory of Legal Positivism. His strictures on those who by their ill-considered notions of Natural Law brought it into some disrepute are just. Scholars who are again considering this law in its proper focus must avoid the errors

of some of their predecessors. Not every line and argument of the author can be approved but these essays are worth careful reading.

THE PHILOSOPHY OF LAW by Antonio Estrada, Ll.B., Ll.M., D.C.L. Manila, 1948, U.S.T. Press. Pp. 86.

A satisfactory and reasonably complete treatise in the vernacular on the Philosophy of Law has long been a desire of jurists who realize that law is not independent of philosophy. Not a few jurists today feel that pragmatism in legal matters is scarcely an end in itself nor even a real assurance of justice. Many, too, believe with alarmed certainty that a lack of philosophy in law leads to excesses beyond control.

It is to recall the legal profession and indeed the whole world to the traditional jurisprudence that the author has submitted his small volume. No claim is made by the author that his work will completely meet the need expressed above but with modesty he does offer his pages for thoughtful reflection.

As far as the author has carried out his intention, his work deserves praise. Perhaps, it is written in too informal a style and may thereby lose some readers who believe that formal propositions and case-study must be the vehicles of instruction.

Great emphasis is rightly placed by the author on Natural Law as the sure foundation of the Philosophy of Law. In this matter he discusses the two passive elements and the one active element in Natural Law. He shows how precepts in this law arise and how the farther one is away from the primary precepts the easier it is to err. Of course, every reference to Natural Law presupposes the recognition of man as a social being. This presupposition is carefully examined by the author and sufficiently expounded. Experience should readily illustrate this presupposition but in the last century it was largely ignored when not actually denied. The author firmly insists that the unity of man is never to be ignored in law.

Duties and rights are the effects of law. These are amply explained by the author. A rather long chapter on justice concludes this work. This is an analysis of the concept of justice and an attempt to fix the place where rights may be legitimately exercised.

A short bibliography is provided. This is entirely in English

except for several Latin and Spanish works. This work would be improved by eliminating some of the long citations in the text.

MANUALE THEORICO-PRACTICUM THEOLOGIAE MORALIS ad mentem D. Thomae. Tomus I, Pars Fundamentalis by P. Ludovicus J. Fanfani, O.P. Libraria "Ferrari", Via dei Cestari, 2, Romae, 1950. Pp. xix-648.

The work of Fanfani is well known to students of Theology and Canon Law. The present book is the first of three volumes to appear on Moral Theology. The remaining two volumes are promised for publication this year.

By and large this book considers the same field as many others in Moral Theology. It has, however, the advantage of an author who is equally talented in Canon Law so that whatever adjustments must be made can be done under the direction of the same commentator.

Some points should be indicated where the author has better than most covered his field. These points are chiefly in the consideration of laws. There is a very fine summation of the doctrine concerning the obligation of laws based on the presumption of fact and on the presumption of law. The pages devoted to the interpretation of laws are on the whole well done. Six rules of interpretation are amply expounded and the function of the judge in canon 17, § 3 is accurately described.

Some other points should be criticized. There are inaccuracies in the use of terms, e.g., perfect societies, if the use of such terms in Public Ecclesiastical Law is adopted as standard. There is also a loose attitude toward the obligation of civil law where, perhaps, no direct moral issue is involved. Further, not enough consideration is given to the opinion that a cause alleged to exist in good faith will sustain a dispensation.

There are very few footnotes to illustrate or support the text. Some references, however, are contained in the text. No bibliography is provided but a satisfactory introductory chapter will be of interest. The index is complete and the author is to be commended for providing this index as the work is published.

HANDBOOK OF NOTES ON THEOLOGY by Rev. Andrew F. Browne, C.SS.R. Revised Edition. Liguorian Pamphlet Office, Liguori, Mo., 1949. Pp. ix-108. Price $1.

As the author himself admits, great harm can come from the use of a handbook on Theology where sufficient explanation must be sacrificed to brevity. Nowhere in this handbook is this sacrifice more evident than in the author's statement that real doubt concerning the cessation of a law does not release from its obligation. This is true in Aequiprobabilism but not in Probabilism. The author should state this as Probabilism is a legitimate Moral System.

Another statement which should be challenged is that it is a solidly probable opinion that all merely civil laws in the United States are purely penal. This is by no means as probable as the author says. Years ago Monsignor John A. Ryan criticized this position as untenable following the best opinion of reliable commentators on the binding force of merely civil legislation. The fact that civil legislators today scarcely advert to conscience has no real bearing on the obligation of these laws. Purely civil laws can exist and it is within the power of the civil authority to enact such laws. But the latter is not assumed either by the merely civil propositions of these laws or by the exceptional penalty enacted for their violation.

If this handbook is used within the bounds suggested by the author some time can be saved in the every day need for consultation. On this basis it deserves the popularity it has received in the past. Commendable mention should be made of the very fine appendix on the places where the decree "*Tametsi*" was in force.

LABOR DICTIONARY. A concise Compendium of Labor Information by Paul Hubert Casselman. Philosophical Library, New York, 1949. Pp. xi-554. Price $7.50.

The publisher announces that this work has been prepared to supply the need for a concise reference guide for matters concerning labor. This announcement is borne out by the large number of entries contained in this dictionary. Over two thousand entries are found. Some of these are biographical items.

Within the brief space allotted to the entries much needed infor-

mation can be found. Colloquial terms are included as well as terms used in legal matters. Reference is made to several Pontifical documents. Brief analysis is made of "*Rerum Novarum*" and "*Quadragesimo Anno*".

The author offers a selected bibliography of recent major works in his field. These are well chosen. But a suggestion might be made to be incorporated in future editions. A separate bibliography of some of the better older but not out of date works could be offered. These works deal largely with principles which must not be forgotten in labor relations. The general utility of this dictionary will become obvious to any one in the labor-management field.

EDWARD ROELKER

THE CATHOLIC UNIVERSITY OF AMERICA

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

Roscoe J. C. Dorsey, D.C.L., *Magister* of the Seminar of the current academic year, read the paper delivered at the final conference of the Seminar held in the Auditorium of McMahon Hall, The Catholic University of America, May 18. The title of his paper was "Wrongs, Delicts, Torts" and in its development the author adopted a historico-comparative technique. At the final conference, as was customary for many years, awards were made to students of the Law School who had distinguished themselves during the academic year. To lend further distinction to the occasion papers were read on "Freedom Is the Lawyer's Job", by Hon. Michael J. Eagen, A.B., Judge of the Court of Common Pleas, Scranton, Pa., and on "The National Outlook" by Hon. Henry Cabot Lodge, Jr., A.B., United States Senator from Massachusetts. The presentation of awards was made by Hon. Felix Frankfurter, A.B., LL.B., LL.D., Associate Justice, Supreme Court of the United States.

Chronicle

GENERAL

His Eminence, Nicola Cardinal Canali, has been named Camerlengo of the Sacred College of Cardinals.

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A diocesan synod was held in St. Augustine presided over by Archbishop Joseph P. Hurley, Regent of the Apostolic Nunciature in Yugoslavia.

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Most Rev. Thomas J. Walsh, D.D., Archbishop of Newark, observed the golden jubilee of his ordination.

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On April 14, Most Rev. John G. Murray, D.D., Archbishop of St. Paul, celebrated a Pontifical Mass to mark the golden jubilee of his ordination.

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On June 11, Most Rev. Joseph P. Lynch, D.D., Bishop of Dallas, celebrated a Pontifical Mass in observance of the golden jubilee of his ordination.

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On June 25, Most Rev. James J. Sweeney, D.D., Bishop of Honolulu, observed the silver jubilee of his ordination.

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Most Rev. L. Abel Caillouet, D.D., Auxiliary of New Orleans, celebrated a Pontifical Mass in St. Joseph's Church, Baton Rouge, to mark the silver jubilee of his ordination.

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On May 24, Rt. Rev. Bernard H. Pennings, O.Praem., LL.D., marked his silver jubilee as Abbot.

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On May 28, the 12th annual Solemn Memorial Mass for the nation's war dead was celebrated by Most Rev. Peter L. Ireton, D.D., Bishop of Richmond, in the amphitheater of Arlington National Cemetery. The observance was sponsored by the Fourth Degree of the Knights of Columbus of Washington, D. C.

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Most Rev. Thomas J. McDonnell, D.D., is the Director of the newly established Mission Secretariat of the National Catholic Welfare Conference. The Executive Secretary is Rev. Frederick A. McGuire, C.M.

On May 25, His Eminence, Samuel Cardinal Stritch, celebrated a Pontifical Mass at St. Mary's Mission House, Techny, Illinois, in observance of the seventy-fifth anniversary of the founding of the Society of the Divine Word and of the fiftieth anniversary of the coming of the Society to the United States.

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On May 29, there opened in Rome the five-day meeting of the International Congress of Social Studies.

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June 12-15, the 35th annual convention of the Catholic Hospital Association of the United States and Canada met in Milwaukee. The principal address was delivered by His Eminence, Samuel Cardinal Stritch.

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May 24-27, the 40th annual convention of the Catholic Press Association was held in Rochester, New York.

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On April 15, the 30th annual convention of the National Council of Catholic Men was held in Washington, D. C.

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April 11, 12, the 24th annual meeting of the American Catholic Philosophical Association was held in St. Paul, Minnesota.

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April 21-23, the 13th National Laymen's Retreat Conference was held in Los Angeles.

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May 4-7, the National Convention of the National Council of Catholic Nurses was held in Los Angeles.

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April 10-14, the 24th annual conference of the Catholic Library Association was held at The Catholic University of America, Washington, D. C.

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March 24, 25, the 12th annual conference on Eastern Rites and Liturgies was held at Fordham University.

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April 11-15, the 7th National Congress of the National Federation of Catholic College Students was held in Pittsburgh.

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June 15-18, the Convention of the National Newman Club Federation was held in Cleveland.

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On April 30, the Confraternity of Christian Mothers convened in Pittsburgh to celebrate the hundredth anniversary of its founding in Lille, France.

On April 27, in St. Monica's Cathedral, Cincinnati, His Excellency, the Most Reverend Apostolic Delegate, celebrated the Pontifical Requiem Mass for the funeral of Most Rev. John T. McNicholas, O.P., S.T.M., who died April 22. The sermon was preached by Very Rev. Ignatius Smith, O.P.

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On April 4, Most Rev. Wendelin J. Nold, D.D., Coadjutor, celebrated the Pontifical Requiem Mass for the funeral of Most Rev. Christopher E. Byrne, D.D., Bishop of Galveston, who died April 1. The sermon was preached by Most Rev. Robert E. Lucey, D.D., Archbishop of San Antonio.

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On April 12, Most Rev. Richard O. Gerow, D.D., Bishop of Natchez, celebrated the Pontifical Requiem Mass for the funeral of Most Rev. Leo Fabian Fahey, D.D., Coadjutor Bishop of Baker City, who died March 31. The sermon was preached by Most Rev. L. Abel Caillouet, D.D., Auxiliary of New Orleans.

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On April 18, Most Rev. Edward J. Kelly, D.D., Bishop of Boise, celebrated the Pontifical Requiem Mass for the funeral of Most Rev. Joseph F. McGrath, D.D., Bishop of Baker City, who died April 12. The sermon was preached by Most Rev. Charles D. White, D.D., Bishop of Spokane.

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Most Rev. Edward D. Howard, D.D., Archbishop of Portland, celebrated the Pontifical Requiem Mass for the funeral of Most Rev. Gerald Shaughnessy, S.M., D.D., Bishop of Seattle, who died on Ascension Thursday.

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DIGNITIES

His Eminence, Eugene Cardinal Tisserant, Secretary of the Sacred Congregation for the Oriental Church, has been elected honorary fellow of the Pierpont Morgan Library in New York City.

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Most Rev. Alexander Zaleski, D.D., Titular Bishop of Lybre and Auxiliary of Detroit, was consecrated on May 23 by His Eminence, Edward Cardinal Mooney. The Co-consecrators were Most Rev. Stephen S. Woznicki, D.D., Bishop of Saginaw, and Most Rev. Allen J. Babcock, D.D., Auxiliary of Detroit. The sermon was preached by Rt. Rev. John S. Vismara, S.T.D.

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On May 24, Most Rev. Stephen S. Woznicki, D.D., was installed by His Eminence, Edward Cardinal Mooney, as Bishop of Saginaw.

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On June 8, Most Rev. David F. Cunningham, D.D., Titular Bishop of Lampsacus and Auxiliary of Syracuse, was consecrated by His Eminence, Francis Cardinal Spellman. The co-consecrators were Most Rev. Walter A. Foery, D.D., Bishop of Syracuse, and Most Rev. Bryan J. McEntegart, D.D., Bishop of Ogdensburg. The sermon was preached by Most Rev. James E. Kearney, D.D., Bishop of Rochester.

Most Rev. Patrick A. O'Boyle, D.D., Archbishop of Washington, has been awarded the Order of the Star of Italian Solidarity in recognition of his work in the alleviation of suffering among the Italian people while he was Executive Director of the War Relief Services of the National Catholic Welfare Conference.

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At its 105th Commencement, the University of Notre Dame conferred honorary degrees on Most Rev. Francis P. Keough, D.D., Archbishop of Baltimore, John J. Hearne, Ireland's Ambassador to the United States, and Msgr. John Patrick Carroll-Abbing.

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Most Rev. John J. Wright, D.D., Bishop of Worcester, has received the honorary degree of Doctor of Canon and Civil Law from Holy Cross College.

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Rt. Rev. Msgr. Thomas J. McMahon, President of the Pontifical Mission for Palestine, has been named a Knight Commander of the Holy Sepulchre.

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The following have been named Protonotaries Apostolic: Rt. Rev. Msgrs. Louis J. Franey, of the Diocese of Rockford; Daniel J. O'Beirne, of the Diocese of Natchez; and Joseph Wurm, of the Diocese of Crookston.

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The following have been named Domestic Prelates: Rt. Rev. Msgrs. James J. Bennett, John J. Brennan, Daniel A. Dwyer, Edmund A. Fitzgerald, Joseph B. Frey, John F. Geary, James F. Irwin, George H. Killeen, Patrick B. Kinsella, John J. Mahon, Peter P. McGovern, James T. Rogers, Owen J. Smith, and Francis X. Wunsch, of the Diocese of Brooklyn; Michael F. Biniskiewicz, Frances Garvey, Joseph J. Glapinski, and James F. Hogan, of the Diocese of Buffalo; Leo M. Keenan, Michael B. Krug, and John J. Laffey, of the Diocese of Rockford; James W. Feider, of the Diocese of Madison; and Joseph Fraling and John P. Funk, of the Diocese of Crookston.

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The following have been named Private Chamberlains: Very Rev. Msgrs. Francis P. Barilla and Vincent O. Genova, of the Diocese of Brooklyn; and Bernard J. McLaughlin, James J. Navagh, and Joseph E. Schieder, of the Diocese of Buffalo.

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George W. Strake, of Houston, has been named Private Chamberlain of the Cape and Sword.

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Dr. Louis D. Moorhead, of Chicago, has been named Knight Commander with Cross and Star of the Order of St. Gregory the Great.

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The following have been named Knights Commander of the Order of St. Gregory the Great: Judge James P. McGranery and John McShain, of the Archdiocese of Philadelphia; and Edward R. Maher and Edward J. Solon, of the Diocese of Dallas.

Andrew Albert Murphy and Valentine J. Peter, of the Archdiocese of Omaha, have been named Knights of the Order of St. Gregory the Great.

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The following have been named Knights of the Order of St. Sylvester: Samuel Pryor, of the Archdiocese of Philadelphia; and Dr. Herbert E. Bolton, Professor Emeritus of the University of California.

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The Papal Medal *Pro Ecclesia et Pontifice* has been awarded to Rev. Alcuin Heibel, O.S.B.; Brother Christopher Lynch, C.F.A., Assistant General and Secretary of the Alexian Brothers; and Mrs. James P. McGranery, of the Archdiocese of Philadelphia.

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The Papal *Benemerenti* Medal has been conferred on Thomas S. Costello, of the Diocese of Hartford.

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Myron C. Taylor, former personal representative of the President of the United States at the Vatican, received an honorary LL.D. from Georgetown University at its 151st commencement.

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Secretary of the Navy Francis P. Matthews received an honorary LL.D. from Villanova College on June 5.

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Attorney General of the United States J. Howard McGrath and Assistant Postmaster General Joseph J. Lawler received honorary degrees at the 72nd commencement of Duquesne University.

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Honorary degrees were conferred by St. Bonaventure's College at its 91st commencement on Most Rev. James E. Kearney, D.D., Bishop of Rochester, Earl James McGrath, U. S. Commissioner of Education, Mrs. Mary T. Norton, Representative from New Jersey, William T. Powers, of the Supreme Court of New York, and Monsignor James F. Hopkins.

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Governor Allen Shivers of Texas received an honorary LL.D. from St. Edward's University, Austin, on May 25.